Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion

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Police stops supported by reasonable suspicion are commonplace. Courts reviewing the propriety of stops frequently rely on the character of the neighborhood in which the stop took place as part of the reasonable suspicion claimed to justify the stop. The character of the neighborhood as one prone to crime or narcotics sales can come to dominate the reasonable suspicion inquiry, allowing stops even where the particularized observations of the suspect offered in support of the stop are extremely minimal. Moreover, the courts respond inconsistently to this factor, producing contrary outcomes in factually similar cases. This Article argues that the character of the neighborhood should not be considered in reviewing the reasonable suspicion determination unless the behavior of the suspect is not common among persons engaged in law-abiding activity at the time and place observed. Such an approach limits the risk that the character of the neighborhood makes every resident of a high-crime area "stop-eligible" and meaningfully enforces the requirement that particularized suspicion justify a police stop.

I. INTRODUCTION

Stops are the heart of American policing. The power to stop a person on reasonable suspicion is a critical law enforcement tool. It is also a focal point for challenges to police propriety and authority. The less individualized suspicion required for an encounter with a suspect, the more police can rely on impermissible—or unspeakable[1]—criteria to choose who will be subjected to such encounters.

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[1] *See* Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting) ("[A]t least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach .... Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.").

Whether persons are subjected to stops turns to a substantial extent on where they live. One factor frequently considered in reviewing the individualized suspicion used to justify an investigative stop[2] is the character of the neighborhood in which the stop took place.[3] Characterization of that neighborhood as a "high crime area" or one "known for drug trafficking" is often critical to the finding of reasonable suspicion.[4] This factor has become a significant and frequently invoked basis on which to argue that highly ambiguous conduct is sufficiently suspicious to justify a stop.

The courts, however, have little guidance as to how to consider this factor. The result is a hodgepodge of inconsistent and incoherent caselaw. Observations of minimal significance are sometimes elevated to reasonable suspicion based on the character of the neighborhood in which the suspect is found; in a "high-crime" area, standing on a street corner[5] or sitting in a parked car[6] have been held to amount to reasonable suspicion that criminal activity is afoot. Such cases raise the significant danger that persons are being subjected to stops based on the neighborhoods in

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[2] These seizures are often referred to as "*Terry* stops." However, I do not use this phrase, because what the court authorized in *Terry v. Ohio*, 392 U.S. 1 (1968), is vastly different from the stops discussed in this Article. This Article addresses only the "stop" and not the subsequent "frisk." Although the Supreme Court has treated determinations of reasonable suspicion to stop and reasonable suspicion justifying a frisk as analytically distinct, the standards are often blurred in practice by the contention that the stop itself exposes the police officer to danger, *see, e.g.*, State v. Hall, 581 So. 2d 337, 339–40 (La. Ct. App. 1991) (holding that an officer who stopped three individuals on report of "some subjects standing on the street corner" in an area where he "regularly investigated shootings and fights" properly patted down an individual who reached into her pocket because "[t]he officer was confronted with three unknown persons in an area with a high incidence of violent crime") or that the possession of narcotics automatically carries with it a reasonable suspicion of weapons possession. *See, e.g.*, Dixon v. Commonwealth, 399 S.E.2d 831, 833 (Va. Ct. App. 1991) ("[T]he suspicion of narcotics possession and distribution gives rise to an inference of dangerousness."); State v. Schladweiler, No. 94-2142-CR, 1994 WL 716810 (Wis. Ct. App. Dec. 28, 1994); *see also* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Verses Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 1002–06 (1998).

[3] This factor has probably been considered as long as there have been stops and frisks. *See* Herman Schwartz, *Stop and Frisk, A Case Study in Judicial Control of the Police*, 58 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 433, 446 (1967).

[4] Professor David Harris has suggested that the combination of location and "evasion"—conduct intended to evade police—is often viewed as sufficient to create reasonable suspicion. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 672–75 (1994). He argues that these factors are used as proxies for race in *Terry* stops and frisks, *see id.* at 681 n.171, and that this practice disproportionately impacts minority communities. *See id.* at 672–75.

[5] *See* Jackson v. State, 804 S.W.2d 735, 737 (Ark. Ct. App. 1991) (en banc).

[6] *See* State v. Lomnicky, No. MV 120200, 1997 WL 162911, at *2 (Conn. Super. Ct. Mar. 26, 1997); Bozeman v. State, 397 S.E.2d 30, 31 (Ga. Ct. App. 1990).

which they are found, rather than the behavior in which they engage while in a particular neighborhood. Other courts, however, reject similar arguments on remarkably comparable facts, concluding that, even in a high-crime area, these inconclusive observations do not meet the requirements of a lawful stop. The inconsistency of these outcomes, and the inadequacy of the justifications supporting them, reflect a judicial struggle to deploy the character of the neighborhood effectively as a factor in the reasonable suspicion determination.

This Article provides a stronger framework for considering the character of the neighborhood in reviewing reasonable suspicion determinations. I argue that the character of the neighborhood may be considered only where the observed behavior offered to support the reasonable suspicion determination is not common among persons engaged in law-abiding activity at the time and place observed. This framework assures that stops remain based on particularized observations that separate potential wrongdoers from the broader community of law-abiding citizens. The framework thereby limits the ability of police to stop any and all persons found in high-crime areas, while retaining the flexibility inherent in the reasonable suspicion standard.

Parts II.A and B discuss the critical elements of the existing reasonable suspicion standard and establish that the character of the neighborhood, standing alone, can never justify an investigatory stop. Part II.C addresses the confusion and inconsistency of the existing caselaw and argues that the current standards impose no effective limitations on stops in high-crime areas. Part III sets out the recommended standard and discusses its advantages, which include logic, fairness, and legitimacy. Finally, Part IV concludes that the recommended approach appropriately refocuses the law on individual responsibility rather than on neighborhood profiles.

II. OH, WHO ARE THE PEOPLE IN YOUR NEIGHBORHOOD? CONSIDERING THE CHARACTER OF THE NEIGHBORHOOD IN EVALUATING REASONABLE SUSPICION

Stops are Fourth Amendment seizures,[7] justified by "reasonable suspicion"—particularized suspicion, short of probable cause, that criminal activity is afoot. The limits on reasonable suspicion stops are thus grounded in the fundamental constitutional limits on government intrusion into the privacy and autonomy of citizens. It is in evaluating whether police had the requisite reasonable suspicion to justify such an intrusion that courts consider the character of the neighborhood. Reasonable suspicion requires some probability that the suspect is engaged in criminal activity, supported by particularized observations of the individual that

[7] *See* Terry v. Ohio, 392 U.S. 1, 16 (1968).

serve to distinguish that individual from the larger universe of law-abiding citizens. It also requires a nexus between the particularized observations and the probabilistic conclusion that the particular individual in question may be involved in criminal activity.

A. *Understanding the Nature of Reasonable Suspicion*

What is "reasonable suspicion?" Judicial decisions are not much help in answering this question, because the courts have affirmatively resisted clearly defining the contours of this "elusive"[8] standard.[9] The courts' reluctance to provide more than a vague outline of the contours of reasonable suspicion stems from the interpretation of reasonable suspicion as a "commonsense, nontechnical"[10] standard, a flexible approach designed to be applied by the police officer on the street in a wide variety of contexts, and rarely second-guessed, after the fact, by judicial officers. Although flexibility and spontaneity are critical to the standard, its content can and should still be explored.

Reasonable suspicion has not been quantified, but it can be approximated. It is less than probable cause,[11] which has been described as a "fair probability,"[12] and it is "considerably less than proof of wrongdoing by a preponderance of the evidence."[13] It requires, however, more than a mere "inchoate and unparticularized suspicion or 'hunch.'"[14] The basis for a determination of reasonable suspicion must be some "objective evidentiary justification"[15]—"specific, articulable facts which, taken together with the rational inferences from those facts,"[16] provide a

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[8] *See* United States v. Cortez, 449 U.S. 411, 417 (1981).

[9] Indeed, the Supreme Court has resisted the very enterprise of clear definition, contending that "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)); *see also* Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."). One commentator has urged that the test cannot be meaningfully applied and should be abolished. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1332–33 (1990).

[10] *Ornelas*, 517 U.S. at 695.

[11] *See Sokolow*, 490 U.S. at 7 ("[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.").

[12] The standard for probable cause to conduct a search is a "fair probability that contraband or evidence of a crime will be found" on the person or in the place to be searched. *See Gates*, 462 U.S. at 238.

[13] *Sokolow*, 490 U.S. at 7.

[14] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[15] *Id.* at 15.

[16] *Id.* at 21.

"particularized and objective basis" for suspecting the individual stopped of criminal activity.[17] Reasonable suspicion is evaluated in a commonsense fashion[18] under the totality of the circumstances[19] and viewed to the extent possible from the perspective of the objectively reasonable[20] trained law enforcement professional,[21] who may draw "specific reasonable inferences . . . from the facts in light of his experience."[22] Those "reasonable inferences" must still be articulable; the officer's experience does not allow him to give free rein to his hunches.[23] But reasonable suspicion is considerably more flexible than probable cause, requiring less proof and permitting the consideration of information less reliable than that required for probable cause.[24] The standard is a "fluid concept [ ] . . . that takes [its] substantive content from the particular contexts" in which it is applied.[25] The observations that support it need not be inconsistent with innocence[26] as long as they "'give rise to an

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[17] *See* United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

[18] *See id.* at 418.

[19] *See id.* at 417–18 ("[T]he totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

[20] *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

[21] *See Cortez*, 449 U.S. at 418 ("[E]vidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

[22] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[23] The line between a "hunch" and an inference based on experience can be hard to draw. *See, e.g.*, State v. Ellington, 680 So. 2d 174, 177–78 (La. Ct. App. 1996) (Byrnes, J., dissenting). The majority in *Ellington* held there was no reasonable suspicion to stop someone in an area "known for high drug activity" who, upon seeing the officer, put his hands in his pocket as if attempting to conceal something, *see id.* at 175–76, notwithstanding the officer's testimony that he thought this activity "suspicious." *Id.* at 175. The dissenter objected: "Deference should be given to the experience of the policemen who were present at the time of the incident. A certain look or gesture may not mean anything to the ordinary person; however, a policeman has sound judgment based on long experience to interpret these acts." *Id.* at 177–78.

[24] *See* Alabama v. White, 496 U.S. 325, 330 (1990).

[25] *See Ornelas*, 517 U.S. at 696.

[26] Although some have argued about whether conduct entirely consistent with innocence can give rise to reasonable suspicion, *see, e.g.*, Harris, *supra* note 4, at 685 (arguing that "something clearly indicative of criminality," *id.* at 687, must be present for reasonable suspicion to be found and that courts should make "the combination of innocent and necessary activity and constitutionally protected activity legally insufficient to rise to the level of reasonable suspicion," *id.* at 685), the answer is clear—of course it can. The observations that give rise to reasonable suspicion need not be inconsistent with innocence. Consider *Terry v. Ohio*, 392 U.S. 1 (1968), itself. The suspects, whose behavior—repeatedly taking turns looking in a store window and

articulable, reasonable suspicion of criminal activity.'"[27]

Any determination of reasonable suspicion is comprised of two separate elements. One is probability. The observed facts must, in light of the officer's experience, demonstrate a sufficient quantum of probability that an individual is involved in criminal activity. The courts have been unwilling to quantify that level of probability, consistent with their unwillingness to quantify[28] any of the critical standards of proof.[29] But the margins of the standard, at least, are clear. It is

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talking briefly on a street corner—caused the alert Detective McFadden to believe that they were casing a store for a robbery, might very well have been waiting for a friend. The conduct which justified the "stop" there was merely "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." *Id.* at 22. Even the determination of probable cause can be based on observations consistent with innocence. *See* Illinois v. Gates, 462 U.S. 213, 244 n.13 (1983) ("[I]nnocent behavior frequently will provide the basis for a showing of probable cause."). The same must be true of the less demanding showing required for reasonable suspicion.

The more interesting problem is how we should treat a situation in which criminal activity is not the most plausible explanation for observed behavior. Unlike the *Terry* situation, where an innocent explanation of the observed conduct might have been viewed as somewhat implausible, the neighborhood cases routinely confront circumstances in which an innocent explanation is as likely, or more likely, than the criminal explanation for observed conduct. Some courts have struggled with formulations that attempt to quantify the degree to which the observed conduct is more likely to reflect criminal activity than innocent activity. *See, e.g.*, Woods v. State, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997) (rejecting prior requirement that, to find reasonable suspicion, acts observed must not be "as consistent with innocent activity as with criminal activity").

[27] United States v. Rickus, 737 F.2d 360, 366 (3d Cir. 1984) (quoting United States v. Black, 675 F.2d 129, 137 (7th Cir. 1982)); *see also* State v. Dean, 645 A.2d 634, 635 (Me. 1994) (holding that reasonable suspicion may be present even though "[t]he conduct actually observed may be entirely lawful").

[28] Some scholars have discussed the possibility of quantifying the degree of probability inherent in these standards. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1301–02 (1982). Others have attempted to quantify the range described by the reasonable suspicion standard. *See, e.g.*, Neil Ackerman, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U. L. REV. 85, 112 (1981) (arguing that "reasonable suspicion, consists of a probability somewhere between five and forty percent").

[29] This may be partly because there is little agreement about how the standards would be defined. Professor McCauliff surveyed 164 federal judges about how they would quantify the percentage of certainty inherent in the reasonable suspicion standard. Responses ranged from 0% to 100%, with significant numbers of respondents setting the standard at 10%, 20%, 30%, 40%, 50%, and 60%. *See* McCauliff, *supra* note 28, at 1327–28. The average percentage was 29.59%. *See id.* at 1332. Although this article was written before the Supreme Court stated clearly that reasonable suspicion requires proof considerably less than a preponderance, *see supra* text accompanying notes 11–13, there is no reason to expect that this legal constraint, which would limit one end of this spectrum, would collapse the substantial variation among permissible responses.

"considerably less" than a preponderance of the evidence.[30] It must, however, be more than zero. Because this standard justifies seizure of citizens and intrusions on their freedom, it must impose some meaningful constraint on police discretion to stop.

The required quantum of probability, whatever it may be, is a necessary but not sufficient condition to a finding of reasonable suspicion. Particularized, individualized suspicion is also required.[31] Something more than a purely probabilistic inference of suspicion based on statistical likelihoods must be present to justify a stop. Consider a hypothetical that concluded that, in a particular

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[30] *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) ("The Fourth Amendment requires 'some minimal level of objective justification' for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.") (quoting Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 217 (1984)).

[31] *See* Maryland v. Buie, 494 U.S. 325, 334–35 (1990) ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted."); *see also* Ybarra v. Illinois, 444 U.S. 85 (1979). Mr. Ybarra was in a tavern when police executed a warrant to search the tavern and its bartender for heroin. The Court rejected the notion that Ybarra's presence in the tavern alone provided probable cause for searching him, concluding that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. The probable cause, the court went on, must be "particularized with respect to that person." *Id.*; *see also id.* at 94 (holding that a *Terry* frisk must be based on "reasonable belief or suspicion directed at the person to be frisked"). This was so notwithstanding that defendant, one of twelve persons present in the "rather small, one-room tavern," *id.* at 97 (Burger, J., dissenting), was, purely as a matter of probability, likely to have been a participant in a heroin transaction. *See id.* at 109 ("'It might well not be reasonable to search 350 people on the first floor of Marshall Field, but we're talking about, by description, a rather small tavern.'"). *But see* United States v. Michelletti, 13 F.3d 838 (5th Cir. 1994) (en banc) (Smith, J., dissenting). Police saw Mr. Michelletti emerging from the back door of a bar at 2 a.m. with a beer in one hand and the other hand in his pocket, joining a group which included one man who had previously attracted the suspicion of officers. Mr. Michelletti was stopped and frisked; police found a gun and he was prosecuted for possession of the weapon. The court held that the stop and frisk were supported by reasonable suspicion. Judge Smith, joined by four others, dissented, objecting that the result was based largely on Mr. Michelletti's being in the company of a suspicious character:

> What the majority today has done is to espouse a "group danger" theory of search justification that is, to say the least, troubling. That theory seems to say that if a person finds himself amongst other persons who may pose a danger, or in a circumstance that, because of the time of day or the part of town, may suggest an increased possibility of criminal activity, that person may be searched without "particularized facts" or individualized suspicion *as to him* . . . . The flaw in this approach is that it eviscerates the requirement of individualized suspicion that is so basic to our Fourth Amendment jurisprudence.

Id. at 848–49 (Smith, J., dissenting).

neighborhood, one person in three was likely to be in possession of unlawful narcotics at any given time. The probability that any individual in that neighborhood was in possession of narcotics would be 33-1/3%. Notwithstanding the percentages (which would appear to satisfy the probability requirements of the reasonable suspicion standard), reasonable suspicion would not exist as to each individual in the neighborhood.[32] Some particularized observations—proof that implicates an identified individual[33]—must also be offered in support of the claim of reasonable suspicion.[34] Courts presented with purely mathematical assessments of probability are ordinarily unwilling to rely on those assessments, unaccompanied by particularized observations, to find reasonable suspicion.[35]

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[32] Comparable arguments have been made with regard to roadblocks. *See* Nadine Strossen, Michigan Department of State Police v. Sitz*: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 359–60 (1991) ("A free and open society does not authorize its police to interdict, inspect, and interrogate its citizens en masse merely because it is statistically predictable that a certain small percentage is breaking the law at any given time."). Stops are more intrusive than the brief sobriety checks authorized in *Sitz*, 496 U.S. 444 (1990), however, giving this argument continuing force in the stop context.

[33] *See* Ackerman, *supra* note 28, at 113 n.154 ("[T]he particularity requirement relates to a *particular* individual.") (emphasis in original).

[34] For an articulation of this argument in the context of drug courier profiles, see Jodi Sax, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After* United States v. Sokolow, 25 LOY. L.A. L. REV. 321, 342 (1991) ("[T]he Court endorses an approach to reasonable suspicion that can be composed entirely of 'probabilistic' elements.").

[35] Although the "pure probability" cases are rare, consider *In re* A.S., 614 A.2d 534 (D.C. 1992). A police officer purchased narcotics from A.S., a juvenile. She then broadcast a description of the seller as "a black male, had on a blue jacket, gray sweatshirt, dark jeans with black skull cap," and further communicated that the suspect was standing with four other subjects all dressed alike. *See id.* at 535. An officer coming upon the scene shortly thereafter saw three young men in the immediate area, all of whom fit the description broadcast by the undercover officer. Determining that "it had to be one of the three," *id.* at 535–36, officers stopped all three youths to await the undercover officer, who identified A.S. as the seller. The court held that there had been no reasonable suspicion for the stop of A.S. Not only would many neighborhood youths have fit the description, *see id.* at 539, but "[i]t is clear that the kind of dragnet seizure of three youths who resembled a generalized description cannot be squared with the long-standing requirement for particularized, individualized suspicion." *Id.* at 540. "To allow the seizure of three people on the basis of a generalized description that would fit many people is directly contrary to 'the central teaching of the [Supreme] Court's Fourth Amendment jurisprudence' demanding specificity." *Id.* The court was profoundly uncomfortable applying a purely probabilistic criterion to establish reasonable suspicion. *Cf.* United States v. Turner, 699 A.2d 1125 (D.C. 1997) (upholding stop of individual on reasonable suspicion where police stopped another individual matching the description at the same time).

The problem of how to treat purely probabilistic proof is hardly unique to this area of the law. *See* David Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101;

That particularity is necessary says little about the strength or quantity of the requisite particularized evidence.[36] As one might expect, where the probabilistic evidence is extremely strong, less in the way of particularized observation might satisfy the standard; conversely, where the probabilistic assessment of the likelihood of criminality is fairly weak, the particularized observations necessary to sustain a determination of reasonable suspicion will need to be more substantial.[37]

Two additional requirements are implicit in the reasonable suspicion standard. The first is some nexus between the particularized observations and the conclusion that criminal activity is afoot.[38] The particularized observations must tend to support the conclusion that an individual is involved in criminal activity.[39] Individualized

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David Kaye, *Probability Theory Meets* Res Ipsa Loquitur, 77 MICH. L. REV. 1456 (1979) [hereinafter Kaye, *Probability Theory*].

[36] "The analytical importance of particularity is not to be confused with the strength of the showing necessary to establish it." *Turner*, 699 A.2d at 1128.

[37] Consider *Minnesota v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993). Mr. Dickerson was observed leaving a multi-unit apartment building "known as a 24-hour-a-day crack house," which was being monitored by police. *See id.* at 842. Upon seeing the police car and making eye contact with the officer, Mr. Dickerson stopped, turned and proceeded in a different direction. *See id.* at 842. The officer stopped Mr. Dickerson and subjected him to a frisk. The Minnesota court concluded that the stop was justified; this issue was not raised in the Supreme Court. While "merely being in a high-crime area will not justify a stop . . . defendant's evasive conduct after eye contact with police, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity." *Id.* The court viewed the relatively insignificant particularized observations as meaningful in light of the inferences that it drew from the character of the neighborhood.

[38] *See, e.g.*, United States v. Cortez, 449 U.S. 411, 418 (1981) ("The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing."). *See also* United States v. Momodu, 909 F. Supp. 1571, 1575 (N.D. Ga. 1995) (stating that while "both time of day and the level of criminal activity in the area" are relevant to the court's analysis, they are, by definition, "facts which focus on defendant's surroundings rather than on the defendant himself," and, therefore, "an additional fact or facts particular to defendant's behavior is required to justify a suspicion of criminal conduct"); Commonwealth v. Wilson, 655 A.2d 557, 561 (Pa. Super. Ct. 1995) ("[A] police officer's reasonable and articulable belief that criminal activity is afoot must be linked with his observation of suspicious or irregular behavior of the particular defendant stopped.").

[39] Some may argue that this analysis is "hypertechnical," noting that the Supreme Court rejected the Ninth Circuit's attempt to impose structure on these determinations in *United States v. Sokolow*, 490 U.S. 1 (1989), *rev'g* 831 F.2d 1413 (9th Cir. 1987), a drug courier profile case. The Ninth Circuit tried to distinguish between those characteristics in a drug courier profile—such as traveling under an alias or engaging in evasive behavior—which suggest that the suspect is engaging in criminal activity, and those factors—travel to or from a source city, time of day, manner of attire (Mr. Sokolow was dressed in a "black jumpsuit and a large amount of gold jewelry," 831 F.2d at 1415)—which describe personal characteristics that create a purely

observations that the person on the street in the "one out of three" neighborhood was, for example, wearing a green coat would not satisfy the requirements of reasonable suspicion. While there would be particularized observation and a probability of criminality, there would be no nexus between the two.

The second implicit requirement is that a determination of reasonable suspicion must distinguish the wrongdoer from the larger universe of presumably innocent persons.[40] To be valid, the factors that support a determination of reasonable suspicion cannot be equally applicable to a substantial proportion of the innocent general public.[41] The criterion of reasonable suspicion must meaningfully narrow

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probabilistic correlation with other persons who engage in narcotics trafficking. The Ninth Circuit held that the latter, standing alone, could not create reasonable suspicion, at least absent empirical proof that the behavior is unlikely to exist in innocent persons, which would require probabilistic evidence compiled from cases other than those before the court. *See* 831 F.2d at 1420. The dissenting judge in the Ninth Circuit deemed this approach "overly mechanistic," *id.* at 1426 (Wiggins, J., dissenting), and the Supreme Court rejected it, stating that "the Court of Appeals' effort to refine and elaborate the requirements of 'reasonable suspicion' in this case creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." *Sokolow*, 490 U.S. at 7–8. The Court did not agree that the types of observations embodied in a drug courier profile could be neatly classified as evidence either of criminal activity or of purely "probabilistic" correlation with drug trafficking activity. For example, the Supreme Court considered buying tickets with cash directly probative of wrongdoing while the Ninth Circuit treated it as a mere "probabilistic" factor. *See id.* at 8.

Although the Court rejected the Ninth Circuit's classification scheme, it, at the same time, confirmed that reasonable suspicion must include some particularized observation of the individual, even though probabilistic inferences may be helpful in interpreting that observation. *See id.* at 7. It is self-evident that the observations must be linked to the inferences the court is asked to draw from them.

[40] "At a minimum, however, the suspicious conduct relied upon by law enforcement officers must be sufficiently distinguishable from that of innocent people under the same circumstances as to clearly, if not conclusively, set the suspect apart from them." Crockett v. State, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991).

[41] *See* William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 594–95 (1984) ("[T]he police must be able to justify singling out from the rest of humanity (or at least from the rest of the people in the general area) the particular individual whom they have stopped as somehow meriting this special attention."). This principle is rarely articulated separately, but courts routinely apply it. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam) (stating that facts which "describe a very large category of presumably innocent travelers" cannot justify a finding of reasonable suspicion); Brown v. Texas, 443 U.S. 47, 52 (1979) (finding no reasonable suspicion when defendant was in a neighborhood with a high incidence of drug traffic and "looked suspicious," because "the appellant's activity was no different from the activity of other pedestrians in that neighborhood") (discussed *infra* text accompanying notes 50–61); United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (requiring reasonable suspicion for roving patrol stops of vehicles in border areas because allowing such stops without reasonable suspicion "would subject the residents of these and other areas to potentially unlimited interference with their use of the highways"); *see also* United States v. Adler,

the category of "stop-eligible" persons.

To argue that reasonable suspicion requires both particularistic observation and probabilistic likelihood may seem curious, because particularistic observations can be viewed as simply a subclass of probabilistic proof. All proof, even the most highly particularized observations, can be understood as probabilistic in character.[42]

No. 95-10084, 1995 WL 669265, at *1 (9th Cir. Nov. 9, 1995) (holding that "hunching over" while at a public phone was "not uncharacteristic public behavior at an open-air phone booth," and "[a]s such, it is insufficient to create reasonable suspicion"); United States v. Chico, No. 92-10061, 1992 WL 289540, at *2 (9th Cir. Oct. 15, 1992) (finding no reasonable suspicion to stop a vehicle when police observation "fails to distinguish the appellees from many law abiding citizens driving late at night on a deserted highway"); United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992) ("[T]he factors cited here describe too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity.... This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California."), *amended by* 997 F.2d 1306 (9th Cir. 1993); United States v. Tapia, 912 F.2d 1367, 1371 (11th Cir. 1990) ("[N]either police officers nor courts should sanction as 'reasonably suspicious' a combination of factors that could plausibly describe the behavior of a large portion of the motorists engaged in travel upon our interstate highways."); United States v. Smith, 799 F.2d 704, 706–07 (11th Cir. 1986) (finding no reasonable suspicion to stop vehicle containing two thirty-year-old individuals driving cautiously with out-of-state license plates on Interstate 95 in Florida at 3:00 a.m.: "Except perhaps for the time of day, the few factors relied upon by Trooper Vogel would likely apply to a considerable number of those traveling for perfectly legitimate purposes along Interstate 95."); State v. Gonzalez-Gutierrez, 927 P.2d 776, 780 (Ariz. 1996) (en banc) (finding no reasonable suspicion to stop vehicle based on furtive glances at a border patrol officer and the Hispanic appearance of the driver and his passenger and stating "[w]ere we to validate this stop, investigatory stops of substantial numbers of innocent people would be permitted merely on the basis of an intuitive hunch"); *In re* A.S., 614 A.2d 534, 539 (D.C. 1992) (finding no reasonable suspicion when description of clothing and physical characteristics of the suspect "could have fit not merely the five individuals on the corner of 4th and Decatur Streets, N.W., but a potentially much greater number of youths in the area"); Commonwealth v. Cheek, 597 N.E.2d 1029, 1031 (Mass. 1992) (finding no reasonable suspicion to stop individual who matched the description of the perpetrator, a black male wearing a three-quarter length goose down jacket, half a mile from a crime scene in a high crime area, and noting that the description of the suspect "could have fit a large number of men who reside in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city. The officers possessed no additional physical description of the suspect that would have distinguished the defendant from any other black male in the area...."). *Compare* United States v. Espinosa, 827 F.2d 604, 606, 609 (9th Cir. 1987) (finding reasonable suspicion when suspect in an area known for drug trafficking, who was about to give a large amount of money to a second man, put the money in his own pocket and walked away quickly when he saw officer: "[W]e do not believe that investigative detentions based on these facts would subject 'a very large category of presumably innocent' persons to 'virtually random seizures.'") (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam)).

[42] *See* Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC'Y REV. 123, 153 (1980–1981) ("Even so-called particularistic evidence is probabilistic. Invariably, all information is really probability information."); *see also* Jonathan J. Koehler, *Probabilities in the Courtroom: An Evaluation of the Objections and*

An eyewitness's testimony that she saw the defendant committing the crime can be interpreted as nothing more than probabilistic evidence, the product of evaluations of the likelihood that the eyewitness is truthful and that she correctly identified and interpreted what she saw. Indeed, certain types of evidence are based explicitly on probability: DNA evidence "identifying" blood found on the defendant's hands as that of the victim is expressly probabilistic evidence.[43] One might conclude that all evidence of any sort has none other than probabilistic value, the most persuasive evidence simply showing a high correlation with the result it is claimed to prove.

Although some would view particularized proof as a subcategory of probabilistic evidence, observations closer to the particularistic end of the scale must be part of the quantum of proof necessary to a finding of reasonable suspicion.[44] The reason is not the quality of the proof, for probabilistic proof can be as probative as particularized proof. Instead, the reason lies in the *function* of the proof.[45] In the reasonable suspicion context, particularized proof serves to constrain police discretion and facilitate judicial review of police decisions. Requiring police

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Policies, *in* HANDBOOK OF PSYCHOLOGY AND LAW 167, 174 (D.K. Kagehiro & W.S. Laufer eds., 1992) ("[A]ll evidence derives its strength, in part, from factors other than those that are unique to the accused party. Overtly statistical evidence differs from other types of evidence only in form, not in substance.") (emphasis omitted); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1330 n.2 (1971) ("*[A]ll* factual evidence is ultimately 'statistical,' and all legal proof ultimately 'probabilistic,' in the epistemological sense that no conclusion can ever be drawn from empirical data without some step of inductive inference . . . .") (emphasis in original).

[43] It is, in fact, an estimate of the relative frequency with which the DNA sequence in question, identified as present in substance in both the suspect's sample and the sample to be matched, is observed in the reference population. *See* David H. Kaye, *DNA Evidence, Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101, 104 (1993).

[44] *See, e.g.*, United States v. Momodu, 909 F. Supp. 1571, 1575 (N.D. Ga. 1995) ("Though relevant to the court's analysis, both time of day and the level of criminal activity in the area are, by definition, facts which focus on the defendant's surroundings rather than on the defendant himself."); State v. Patterson, 637 A.2d 593 (N.J. Super. Ct. Law Div. 1993), *aff'd*, 637 A.2d 599 (N.J. Super. Ct. App. Div. 1994). In *Patterson*, a profile case, the defendant, a young black male wearing athletic attire, was stopped while taking a taxi to Asbury Park from the Red Bank, N.J., train station. Police contended that he fit a "profile" of drug traffickers who used taxis to evade detection when riding mass transit from New York City to Asbury Park. The court found no reasonable suspicion for the stop, rejecting police consideration of the race of the defendant. *See id.* at 598. A major basis for the court's conclusion was that "a reasonable suspicion to justify a stop and subsequent questioning of a suspect could not arise solely on the basis of conclusions that do not fairly result form [sic] an individual's actions and conduct." *Id.* at 597; *see also id.* at 598 ("Appearance taken alone is insufficient to justify a stop. There must be more, i.e., some conduct on the part of the defendants, reasonably leading to the conclusion that seemingly innocent acts, when considered in their totality, evidence criminal wrongdoing.").

[45] For an argument that questions the insistence on individualized suspicion, see Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 82 n.270 (1991).

to articulate those observations that attracted them to a particular individual encourages them to *make* those observations and to base their decisions on those observations rather than on arbitrary or discriminatory considerations.[46] Those assessments, in turn, are more easily reviewable.[47]

The requirement of particularized suspicion also reflects concepts of control and autonomy. It suggests that persons, by their conduct, can to some extent control when and whether they are subjected to nonconsensual encounters with the police. This will not always be true,[48] but the idea that persons engaging in improper conduct are subject to police intervention carries inherent in it the converse: that individuals have some power to avoid such interventions by choosing not to engage in conduct that will subject them to scrutiny. Requiring police to articulate a basis for suspicion that derives from the conduct of the citizen thus creates power on the part of the citizen to avoid nonconsensual encounters with law enforcement.[49]

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[46] *See* Mertens, *supra* note 41, at 587 (arguing that, as in administrative law, requiring police to articulate a particularized justification for their actions encourages more "rational and coherent" conduct).

[47] This concern was reflected in the courts' struggle with the "drug courier profile" cases. Asked to evaluate suspicion based largely on categories derived outside the context of the particular case before them, judges had little meaningful opportunity for review. The solution was to treat the observations as particularized and to permit the courts to draw inferences from them without relying on the characterization of the observations as a "profile." The Supreme Court essentially ducked the profile issue by treating each profile case as one based on particularized suspicion. *See* United States v. Sokolow, 490 U.S. 1, 10 (1989):

> We do not agree with respondent that our analysis is somehow changed by the agent's belief that his behavior was consistent with one of the DEA's "drug courier profiles." A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

Id. (citation omitted).

[48] An innocent person who matches the description of a criminal actor provided by a knowledgeable and reliable informant may be stopped and questioned based solely on her physical characteristics or the clothing she is wearing, regardless of the fact that nothing she has done (except perhaps choose her clothing that morning) has engendered any suspicion whatsoever. That she is not the right person does not make the stop impermissible; we require police to be reasonable, but we do not require them to be right all the time.

[49] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting) ("Searches based on individualized suspicion . . . afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way."); *see also* United States v. Perrin, 45 F.3d 869, 873 (4th Cir. 1995):

> That the Yorktown Apartments are located in a high crime area does not, in and of itself,

B. *The Use of the Character of the Neighborhood in Evaluating Reasonable Suspicion*

The requirement of particularized observation suggests that the character of the neighborhood, standing alone, should not constitute reasonable suspicion, and the Supreme Court has held as much. Reasonable suspicion cannot be based solely on the neighborhood where an individual is found. However, as Part II.B.2 demonstrates, the courts have struggled to figure out how much more is required, and many have concluded that not much is. For some courts, at least, the story of reasonable suspicion is mostly a story about the neighborhood.

1. *Relying on Neighborhood Alone to Provide Reasonable Suspicion*

Standing alone, the character of the neighborhood where a suspect is found cannot support a finding of reasonable suspicion. This is the clear message of *Brown v. Texas*.[50] Police officers cruising an area of El Paso, Texas with a "high incidence of drug traffic,"[51] observed Zachary Brown walking down an alley, in the opposite direction from another man. Thinking Mr. Brown "looked suspicious," officers stopped him, and told him, in response to his objections, that he was in a "'high drug problem area.'"[52] Mr. Brown refused to identify himself and was arrested for this refusal.[53] No evidence of any wrongdoing was found.

The Supreme Court concluded that there was no reasonable suspicion to justify the stop of Mr. Brown.[54] The Court unequivocally rejected the possibility that reasonable suspicion could be based solely on the character of the neighborhood:

> provide the officers with sufficient indicia of reliability to justify a *Terry* search. Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control.

Id.

[50] 443 U.S. 47 (1979). *Brown* has been referred to as the "zenith in the fourth amendment's protection of the person on the street." Maclin, *supra* note 9, at 1328.

[51] 443 U.S. at 49.

[52] *Id.*

[53] Mr. Brown was arrested for violating a Texas statute making it a crime to refuse to give his name and address "to a peace officer who has lawfully stopped him and requested the information." *Id.* at 49 n.1. Therefore, the question of the legality of the encounter was squarely presented.

[54] Although the arresting officer testified that there was drug trafficking in the area and that the defendant "looked suspicious," he "was unable to point to any facts supporting that conclusion." *Id.* at 52. A footnote distinguished this situation from "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Id.* at 52 & n.2.

"The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."[55]

Brown presented the Court with the best possible fact situation to test this principle, one in which the poorly articulated hunch of the officer did not ripen into any concrete proof of wrongdoing. Mr. Brown did not possess any contraband, so the officer's after-the-fact report of his before-the-fact perceptions was unaffected by the outcome of the search.[56] Similarly, the courts were unaffected by the concern that overturning the stop would lead to suppression of probative evidence in the case before them. *Brown*, in other words, was a case in which most participants were most likely to follow the rules,[57] and its conclusion that the character of the

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[55] *Id.* at 52. There was other information besides the character of the neighborhood offered in *Brown*, namely, the officer's assertion that Mr. Brown "looked suspicious." The Court's ruling makes clear that purely subjective assessments of officer suspicion carry no weight in a determination of reasonable suspicion. *See also* United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996) (finding no reasonable suspicion when officer's suspicion of suspect was based on his "perception"); Barnes v. State, 491 S.E.2d 116, 117 (Ga. Ct. App. 1997) (finding no reasonable suspicion when police saw individual at a "high stop and cop" area who "was just acting suspicious"); State v. Nealen, 616 N.E.2d 944, 945–46 (Oh. Ct. App. 1992) (finding no reasonable suspicion when officers observed a white male in a black neighborhood known as an "extremely high crime area" when the stop was based on "a suspicion that maybe something was going wrong") (emphasis omitted).

Articulating *too many* suspicions may be as bad as not articulating any. *See, e.g.*, State v. Chark, 693 So. 2d 316, 320 (La. Ct. App. 1997). Police stopped an individual in a high crime area who was wearing black clothing and tennis shoes and who was leaning against a tree at 11:30 p.m. When the individual saw the officers, he moved towards his bicycle. *See id.* at 317. The officer claimed that he stopped Mr. Chark for three reasons—he was not sure whether Mr. Chark owned the bicycle, he suspected Mr. Chark might be a burglar, and he suspected Mr. Chark was trafficking in drugs. *See id.* The court held there was no reasonable suspicion, stating "[t]he fact that [the officer] cited three distinct reasons for approaching the defendant . . . establishes that the officers stopped the defendant based on a generalized suspicion or 'hunch' regarding the defendant's possible involvement in criminal activity." *Id.* at 320.

[56] This is invariably a concern in the suppression context. The officer, certain of the outcome, is able to tailor—whether consciously or not—his recollection of his initial observations to match more closely what was actually found.

[57] Or, put differently, it presented the case in which the character of the remedy was least likely to affect the fashioning of the right at issue. The argument that the drastic character of the Fourth Amendment exclusionary rule has a substantial and distorting impact on the content of the constitutional right has been well articulated elsewhere. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036–41 (1974); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV 881, 910–18 (1991); George C. Thomas III & Barry S. Pollack, *Saving Rights From a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147–49 (1993). Although these concerns might explain the refusal to recognize a

neighborhood alone cannot support a finding of reasonable suspicion is frequently articulated.[58]

Brown might reflect more the officer's inarticulateness or lack of creativity, or perhaps his honesty, than a strongly stated principle about the relevance of the character of the neighborhood to a determination of reasonable suspicion. Had the arresting officer there articulated a minimal but particularized factual observation supporting his conclusion that Mr. Brown "looked suspicious," those observations plus the character of the neighborhood for criminality might have been evaluated differently. Yet *Brown* indicates that the failure to make those observations is fatal. If all the state can muster is the neighborhood and the hunch, the stop is impermissible.[59] Moreover, the suspect's behavior must distinguish him from other,

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constitutional violation in a circumstance where the exclusionary rule would result in suppression of vital evidence and the acquittal of a guilty suspect, the reverse may not be true; those deciding *Brown* certainly knew that the principles set down in the case might lead at another time to the suppression of relevant evidence.

[58] *See, e.g.*, United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997) ("[T]he fact that Officer Riccio spotted Poindexter in a high crime neighborhood at 5:30 p.m. on a sunny day does not provide independent or freestanding grounds for reasonable suspicion."); People v. Rahming, 795 P.2d 1338, 1343 (Colo. 1990) ("A history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality.") (quoting People v. Aldridge, 674 P.2d 240, 242 (Cal. 1984)); McCreary v. State, 538 So. 2d 1377, 1379 (Fla. Dist. Ct. App. 1989) (finding no reasonable suspicion to stop a car that "contained two blacks and two whites, bore out-of-state tags, and was parked in an area known for drug activity. Mere presence in a predominantly black, high-crime area is not a sufficient basis upon which to justify a stop."); Walker v. State, 514 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 1987) (finding no reasonable suspicion when person in an area where numerous drug arrests had recently been made moved to conceal something from police officers: "[T]he fact that he was in a high crime area is not alone sufficient to conclude that he was engaged in, or about to engage in, criminal conduct."); Tumblin v. State, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996) ("The color of one's skin, the neighborhood one happens to be in, and the fact that one turns away from the police are not sufficient, individually or collectively, to establish a reasonable suspicion of criminal activity."); State v. Moya, 775 P.2d 927, 929 (Or. Ct. App. 1989) (finding no reasonable suspicion when police saw woman, sitting in her car at 6 p.m. in an "area of intense drug trade," making furtive movements with her hands: "[P]olice suspected defendant for simply being where she was. That is an insufficient basis for a stop."); Commonwealth v. Wilson, 655 A.2d 557, 561 (Pa. Super. Ct. 1995) ("A suspect's mere presence in an area known for high drug-related activity is not sufficient to create a reasonable suspicion in the minds of police in order to justify a warrantless investigative stop under *Terry*.").

[59] *See Brown*, 443 U.S. at 52 ("In the absence of *any* basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference."); *see also id.* at 53 ("[T]he officers lacked *any* reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct.") (footnote omitted) (emphasis added).

presumably innocent persons in the neighborhood.[60] If he was subject to a stop, all those other individuals could have been as well.[61]

2. *Neighborhood "Plus"*

Brown v. Texas established that the character of the neighborhood, standing alone, cannot support a determination of reasonable suspicion.[62] Nonetheless, the character of the neighborhood has been deemed an "articulable fact" that is

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[60] *See Brown*, 443 U.S. at 52 ("In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood.").

[61] *See id.* While they could be, they probably would not be. The Court went on to make clear that the danger in such stops is the potential for arbitrary and discriminatory enforcement that they create. If stops are "not based on objective criteria . . . the risk of arbitrary and abusive police practices exceeds tolerable limits." *Id.*

[62] One might question this principle at the extremes, where one could argue that location alone creates a comparatively high likelihood of involvement in criminal conduct. Imagine, for example, that an abandoned building is being used to sell narcotics, no one lives in the building, and the neighborhood surrounding it, for several blocks, is deserted. Walking into that building, without more, might indicate a comparatively high probability of participation in an illegal transaction, one that could be empirically demonstrated, even if nothing about the behavior of the individual entering the building aroused any additional suspicion. *See, e.g.*, People v. Nelson, 505 N.W.2d 266, 272 (Mich. 1993). After conducting surveillance at a house that was the site of a controlled drug buy, police observed three individuals drive up to the house, enter and remain in the house for four minutes, and depart. The three were stopped and cocaine was found on their persons. The court concluded that "three males visiting an operating drug house for merely four minutes" sufficed to create reasonable suspicion. *See id.* at 272; *see also* State v. Lewis, No. 14637-5-111, 1997 WL 148623, at *1 (Wash. Ct. App. Apr. 1, 1997) (finding reasonable suspicion to stop an individual entering a "known drug house" at 1:10 a.m. who remained inside briefly and then exited). *But see* State v. Anderson, 552 N.W.2d 900 (Wis. App. 1996) (unpublished opinion) (holding that there was no reasonable suspicion to stop individual present at a house where police were making an arrest for drug dealing because officer "wanted to find out what he 'was doing there.'" "[T]here was nothing to connect Anderson to any suspicious activity, other than his mere presence.").

The Supreme Court faced such a case without deciding it. In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the defendant was stopped because an officer observed him leaving a twelve unit apartment building the officer considered a "notorious 'crack house'" at 8:15 p.m., *see id.* at 368, and because he appeared to evade the officer. The issue of the propriety of that stop was not before the Court because the respondent did not ask the Court to review it.

I note two points here. First, an entire neighborhood is unlikely to establish the same kind of probability as a single building, precisely because, regardless of the neighborhood's high level of criminality, large numbers of innocent persons are still likely to live and work there. Second, these cases might be explained satisfactorily as involving conduct rather than pure location—it was the brief stay in the drug houses from which criminal conduct was actually inferred in *Nelson* and *Lewis*, while mere presence in *Anderson* did not create an inference of criminality.

routinely considered in the reasonable suspicion determination.[63]

The cases in which the character of the neighborhood is considered are problematic for two reasons. The first is the de minimis nature of the particularized observations often offered in support of reasonable suspicion stops in high-crime areas. Some courts conclude that a single observation of ambiguous conduct is sufficient to create reasonable suspicion when coupled with a claim that criminal activity is prevalent in the surrounding neighborhood. In these cases, the courts bootstrap highly ambiguous conduct to reasonable suspicion based on the character

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[63] *See* United States v. Moore, 817 F.2d 1105, 1107 (4th Cir. 1987); United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984) ("The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely."). The pertinence of this factor is discussed briefly in Brian J. O'Connell, Note, *The Erosion of the Fourth Amendment Under the* Terry *Standard*, 16 U. DAYTON L. REV. 717, 726–30 (1991).

Criticism of this principle has sometimes centered on the legitimacy of the assertion that the area really is a high crime area as police have characterized it. *See, e.g.*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(f), 189–90 (3d ed. 1996):

> In view of the readiness with which courts make this characterization [as a high-crime area], even as to better neighborhoods, it would seem that greater circumspection is called for here. Unspecific assertions that there is a crime problem in a particular area should be given little weight, at least to more particular indications that a certain type of criminal conduct of the kind suspected is prevalent in that area.

Id.; *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 222 n.42 (1983) ("The basis for declaring an area crime-prone may be flimsy. Some police officers describe all areas as 'crime-prone.'"); R.S. Frenchman, Recent Development Note, 67 TUL. L. REV. 1715, 1718 (1993) (arguing that the court should not have judged the appropriateness of a frisk by considering the "high crime" area of the encounter and the likelihood that the suspect posed a threat to officer safety); United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996). In the first *Bayless* opinion, District Judge Harold Baer expressed skepticism about testimony by police that "'everything north of 155th [a street in Manhattan] was . . . an area known for its high drugs.'" 913 F. Supp. at 240 n.12. The court noted further that "the Government offered no proof to corroborate their statement" that the area surrounding the stop was a "known hub for the drug trade." *Id.* In his subsequent opinion vacating the earlier one and denying the motion to suppress, the judge noted that affirmations had been submitted demonstrating that the pertinent area was "known amongst law enforcement officers as a significant center of narcotics trafficking." 921 F. Supp. 215, n.4.

Courts occasionally attempt to resist this inducement. *See, e.g.*, People v. King, 594 N.Y.S.2d 130, 134 n.3 (N.Y. Sup. Ct. 1993) ("The People have not presented sufficient evidence to establish that the area surrounding the Port Authority Bus Terminal at 10:10 p.m. on a Saturday night is properly characterized as a 'drug prone location.'"), *rev'd*, 606 N.Y.S.2d 647 (N.Y. App. Div. 1994) ("We have recently had occasion to find that this specific area of Manhattan is indeed 'a location known for illegal drug activity.'") (quoting People v. Shaw, 596 N.Y.S.2d 832 (N.Y. App. Div. 1993)).

of the neighborhood.[64] The particularized observations offered in support of the reasonable suspicion determination can be as insignificant as sitting in a parked car[65] or crossing the street twice.[66] Although these behaviors would not seem to justify reasonable suspicion that a crime was afoot, in neighborhoods known for drug activity, engaging in them at an unusual hour has been held to justify an investigatory stop. Walking across a shopping center parking lot late at night,[67] looking into the open palm of a companion,[68] or looking into the trunk of someone's car[69] can create reasonable suspicion in neighborhoods known for crime. An empty car with its engine left running in an alleyway would not be particularly surprising on a cold night in Minneapolis in February; place the car in a "high crime

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[64] *See, e.g.*, United States v. Tomlin, No. 93-10545, 1995 WL 478175, at *1 (9th Cir. Aug. 10, 1995) (finding reasonable suspicion to stop defendant who was "observed alone in his car, with the radio turned up, after midnight in a high-crime area"); State v. Dean, 645 A.2d 634, 636 (Me. 1994) (finding reasonable suspicion to stop individual driving at 11 p.m. in area, uninhabited on weekdays, where there had been recent crime reports); Timms v. Maryland, 573 A.2d 397, 402 (Md. Ct. Spec. App. 1990) (finding reasonable suspicion when officers observed two men in conversation in an alley at 5:30 a.m. in an area where police received "a lot of B&E calls" and "narcotics calls").

[65] *See, e.g.*, State v. Lomnicky, No. MV 120200, 1997 WL 162911, at *2 (Conn. Super. Ct. Mar. 26, 1997) (officer's "observation in the early morning hours of two persons in the front seat of an automobile parked in a parking lot, located in a high crime area, where to his knowledge numerous drug and prostitution arrests had taken place was sufficient to arouse a reasonable suspicion necessitating an investigation"); Bozeman v. State, 397 S.E.2d 30, 32 (Ga. Ct. App. 1990) (officer's "observance of the appellant and his companions sitting for no apparent reason in a parked automobile in a remote part of a motel parking lot located in a 'high crime area' at 4:45 a.m. was sufficient to excite a reasonable suspicion that criminal activity might be afoot"); State v. Butler, 650 A.2d 397, 403–04 (N.J. Super. Ct. App. Div. 1994) (reasonable suspicion where individual was sitting in a car with a broken window in a motel parking lot with the engine running at 12:30 a.m. in a "high crime neighborhood"); State v. Hughes, No. 93-1168-CR, 1994 WL 36035, at *3 (Wis. Ct. App. Feb. 10, 1994) (finding reasonable suspicion to investigate four individuals in a parked vehicle in tavern's drive-through lane for 3-5 minutes, where the parking lot was "known for drug dealing").

[66] *See* Thompson v. State, 668 So. 2d 904, 904 (Ala. Crim. App. 1995) (mem.) (Taylor, J., dissenting) (arguing that crossing the street twice at 2 a.m. in a "high drug traffic area" should not justify a finding of reasonable suspicion).

[67] *See* People v. Ellis, 446 N.E.2d 1282, 1284–85 (Ill. App. Ct. 1983) (finding reasonable suspicion to stop two men walking across a shopping center parking lot at 1:25 a.m. where "a rash of burglaries and break-ins had recently occurred in the area").

[68] *See* United States v. Lender, 985 F.2d 151, 153 (4th Cir. 1993) (finding reasonable suspicion to stop an individual who looked into the open palm of a companion at 1:00 a.m. in a neighborhood "where heavy drug traffic occurred").

[69] *See Thompson*, 680 So. 2d at 1015 (looking in trunk and slamming the trunk shut as police approach in an area "known for its drug trafficking activity" constitutes reasonable suspicion).

neighborhood," and the circumstances justify an investigative stop.[70] Being unknown to the officer may be enough to create reasonable suspicion—but only in the wrong kind of neighborhood.[71] Similar observations in neighborhoods not known for crime have been held insufficient to create reasonable suspicion.[72] Vocal objection comes from dissenting judges, who argue that these outcomes in effect create a "high crime area" exception to the Fourth Amendment.[73] The ordinary

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[70] *See* United States v. Knox, 950 F.2d 516, 519 (8th Cir. 1991).

[71] *See* United States v. Constantine, 567 F.2d 266 (4th Cir. 1977).

[72] *Compare* Lambright v. State, 487 S.E.2d 59, 61 (Ga. Ct. App. 1997) (finding reasonable suspicion where officers observed defendant standing on corner in a "high-crime area" in front of a store known as a "stop and cop" location, and observed a "hand-to-hand exchange" between defendant and another man), *with* State v. Fowler, 451 S.E.2d 124, 124–25 (Ga. Ct. App. 1994) (finding no reasonable suspicion where men in a car in a parking lot engaged in "back and forth motions," and there was no testimony that the area was known for drug transactions); *compare* Commonwealth v. Moses, 557 N.E.2d 14, 17 (Mass. 1990) (finding reasonable suspicion where officer saw four Black or Latino men standing near a parked automobile in a high crime area and one person in the vehicle "ducked down" after making eye contact with officer), *with* People v. Swisher, 565 N.E.2d 281, 283–84 (Ill. App. Ct. 1990) (holding that lower court did not err in finding no reasonable suspicion where officer saw person in a parked car "duck down"; there was no evidence that the hour was late or the "location was a high-crime area"); *compare* State v. Miskel, 668 So. 2d 1299, 1303 (La. Ct. App. 1996) (finding reasonable suspicion where suspect matched anonymous tipster's description of possible drug violator; court takes judicial notice that "the challenged encounter took place in a high crime area"), *with* State v. Hartzheim, 633 So. 2d 768, 773 (La. Ct. App. 1994) (holding no reasonable suspicion based on anonymous tipster's claim that suspect was in possession of a large quantity of marijuana where police observation corroborated no incriminating parts of the tip and "there was no indication the area was a known drug location"); *compare* Bailey v. State, 629 S.W.2d 189, 190 (Tex. Ct. App. 1982) (finding reasonable suspicion to stop individual who stopped his car in front of a 7-Eleven store under construction and appeared to be moving boxes in his car; vehicle was in an area "identified as one of high-crime"), *with* United States v. Kerr, 817 F.2d 1384, 1387 (9th Cir. 1987) (holding that officer seeing defendant loading boxes into a vehicle on residential property at mid-afternoon when officer did not know who lived in the house or what vehicles they drove and the "level of crime in the neighborhood was disputed" did not amount to reasonable suspicion).

[73] *See, e.g.*, United States v. Trullo, 809 F.2d 108, 116 (1st Cir. 1987) (Bownes, J., dissenting). Judge Bownes dissented from the court's holding that a brief encounter between a driver and a pedestrian in Boston's Combat Zone, followed by the pedestrian's entering the car and driving with the driver to an isolated street a few blocks away and having a conversation, provided reasonable suspicion for the stop of the driver:

> [W]e are asked to find reasonable suspicion on the basis of quite general characteristics of a sizeable area of the city, when the suspicion was not grounded in any specific information about date, time, or the particular individuals.... It would seem that, for the court, the Combat Zone is a *per se* region of lessened expectation of privacy, at all times of the day and at all periods of the year, where practically unlimited deference is granted to police officers' discretion.... [T]he court... has effectively eliminated any fourth amendment scrutiny of

nature of the particularized observations relied upon in these cases raises the possibility that these stops are, in truth, based solely on the character of the neighborhood, or on the character of the neighborhood plus an unsubstantiated police "hunch," both prohibited outcomes under *Brown v. Texas*.

The second reason these cases are troubling is the courts' inconsistent response to similar fact situations. Other courts purporting to apply the same Fourth Amendment standards conclude, with equal vehemence, that comparable facts do not support a determination of reasonable suspicion. Courts reaching these conclusions typically hold that the particularized conduct observed is not sufficiently indicative of criminality[74] to support the finding of reasonable

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police suspicions concerning activity on Hayward Place.

Id.; *see also* State v. Bobo, 524 N.E.2d 489, 493–94 (Ohio 1988) (Wright, J., dissenting) (arguing that stop of defendant based on observing him bend down in his car, which was parked in an area known for drug transactions, "was based on an officer's mere suspicion generated by little more than the fact that the defendant was legally parked in a high crime area," and complaining that the court created "what amounts to a 'high crime area' exception to the protections extended by the Fourth and Fourteenth Amendments"); People v. Diaz, 579 N.Y.S.2d 659, 661 (N.Y. App. Div. 1992) (Smith, J., dissenting) (dissenting from court's conclusion that there was "founded suspicion" under New York law to request information of a man holding a black plastic bag close to his body: "The law requires more than a hunch for the police to approach an individual even in a drug prone neighborhood.").

[74] *See, e.g.*, *Kerr*, 817 F.2d at 1387 (finding no reasonable suspicion where individual was observed loading trunk of a car with boxes in mid-afternoon in neighborhood subject to several recent residential burglaries); United States v. Momodu, 909 F. Supp. 1571, 1575 (N.D. Ga. 1995) (finding no reasonable suspicion where individual drove rapidly into an apartment complex with a history of petty crime at 4:30 a.m., entered a building carrying a bag, and left the building carrying the same bag shortly thereafter); State v. Bodereck, 549 So. 2d 542, 544 (Ala. Crim. App. 1989) (finding no reasonable suspicion as to driver of vehicle where officer "observed a black male leaning into the passenger side of a parked Cadillac bearing out-of-state license plates and containing two white males" in an area with "a reputation for extensive drug activity"); Ozhuwan v. Alaska, 786 P.2d 918, 922 (Alaska Ct. App. 1990) (finding no reasonable suspicion where two cars parked together in an unusual location in a campground where minors typically drank alcohol); *In re* Appeal in Pima County Juvenile Action, 733 P.2d 316, 317–18 (Ariz. Ct. App. 1987) (finding no reasonable suspicion for school search of minor based on fact that student's name had been mentioned in discussions of drug use and sales at school and that student was seen in the area of the school bleachers, where students went to cut class and use alcohol and drugs); Smith v. State, 637 So. 2d 343, 344 (Fla. Dist. Ct. App. 1994) (finding no reasonable suspicion where an individual was parked next to a closed business at 9:00 p.m. on a street where there were frequent burglaries); State v. Fleming, 415 S.E.2d 782, 783 (N.C. Ct. App. 1992) (finding no reasonable suspicion to stop an individual standing with a companion at 12:10 a.m. in the vicinity of a housing project "where 'crack' cocaine and other contraband were sold on a daily basis," because officer had never seen him before, and he and his companion were walking away from officer); Williams v. Tennessee Dep't of Pub. Safety, 854 S.W.2d 102, 105–06 (Tenn. Ct. App. 1992) (finding no reasonable suspicion to investigate vehicle parked in nightclub parking lot

suspicion.[75] "Should these factors be found sufficient to justify the seizure of this defendant," one court noted, "such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a 'high drug area.' This would not be reasonable."[76]

The result is an extraordinary body of case law, in which strikingly similar

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known for narcotics use).

[75] The courts can be explicit in their view that a claim of reasonable suspicion in such circumstances is unreasonable. *See, e.g.*, State v. Banks, 479 S.E.2d 168, 170–71 (Ga. Ct. App. 1996) (finding no reasonable suspicion where nervous-appearing individual, a black male, with his hand in his pocket was seen with two others on street corner at 7:00 p.m. in an area where drugs were frequently sold). The court rejected what it viewed as an attempt to bootstrap these observations into a basis for reasonable suspicion by claiming that this conduct, in light of police expertise, justified particularized suspicion:

> Although the police officers testified that the men were standing "in the mode of the stop and cop drive-by method of conducting drug sales," it is important to understand just what this means. Both officers testified that this "mode" consists of standing on the side of the street and waiting to make drug sales. Hence, under this definition these three men in Columbus or three judges of this court in Atlanta, if waiting on the side of the street for any purpose, would be standing in the mode of a "stop and cop." Clearly, then, standing on the side of the street, without something more, proves nothing. In this case, there was nothing more . . . there is no testimony that the officers saw any of these men do anything remotely suggesting a drug transaction. The men merely were standing near an apartment building on the side of a public street around 7:00 p.m. on the evening of May 17, 1995.
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> Moreover, although the police rely upon the fact that the men were in an area in which drugs were frequently sold, there is no evidence this information was known to these men, or that if it was known, that such information, standing alone, has any significance. Unfortunately, the many appellate cases referring to "known drug areas" or "areas where drugs are frequently sold" demonstrate that areas fitting these labels exist in many of the cities and towns of this state. It is equally unfortunate, however, that not all persons found within these areas are involved with drugs. As one of the officers in this case reluctantly admitted, some decent people live in areas that are known to the police for frequent drug activity. Therefore, we do not find that appellee's mere presence in an area known to the police for its drug activity, without more, is sufficient to support a reasonable suspicion that appellee was engaged in or about to engage in criminal activity.

Id. at 170–71.

[76] *Fleming*, 415 S.E.2d at 785–86. Officers stopped two men who had been standing at 12:10 a.m. in a housing project "where 'crack' cocaine and other contraband was sold on a daily basis," who observed the officers for a few minutes and then walked away from them. *See id.* at 783. The officer stopped them because he had never seen Mr. Fleming or his companion before. The court held the stop was not supported by reasonable suspicion and considered the case analogous to *Brown v. Texas*, 443 U.S. 47 (1979). *See Fleming*, 415 S.E.2d at 785–86; *see also supra* text accompanying notes 50–61.

behaviors in high crime areas lead to wildly different outcomes.[77] In a high crime

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[77] *Compare* Harris v. State, 568 So. 2d 421, 422, 424 (Ala. Crim. App. 1990) (finding no reasonable suspicion where vehicle was observed driving slowly after midnight through a neighborhood where a number of nighttime automobile thefts and burglaries had been reported), *with* United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984) (finding reasonable suspicion to stop car driving slowly at 3:30 a.m. in residential area that had been recently subjected to numerous unsolved nighttime burglaries); *compare* Hills v. State, 629 So. 2d 152, 155–56 (Fla. Dist. Ct. App. 1993) (finding no reasonable suspicion where individual was seen at night with a group of men in an "area known for drug transactions" looking into the open palm of another man), *and* State v. Anderson, 696 So. 2d 105, 105–07 (La. Ct. App. 1997) (finding no reasonable suspicion to stop man showing something in his cupped hand to another man, who walked away when officers approached), *with* United States v. Lender, 985 F.2d 151, 153–54 (4th Cir. 1993) (finding reasonable suspicion to stop individual who, at 1:00 a.m. in area "where heavy drug traffic occurred," was observed with four or five men looking into his open palm); *compare* Dames v. State, 566 So. 2d 51, 52 (Fla. Dist. Ct. App. 1990) (finding no reasonable suspicion where individual was seen leaning into the passenger window of a car in a "well-known drug area" where the car departed abruptly on seeing the officer), *with In re* F.R., 568 N.E.2d 133, 137 (Ill. App. Ct. 1991) (finding reasonable suspicion to stop juvenile who walked over and talked with driver of a car, then walked away from the car, at a corner where the officer knew drug transactions occurred); *compare* People v. Morrison, 555 N.Y.S.2d 183, 184–85 (N.Y. App. Div. 1990) (finding no reasonable suspicion to stop two men sitting in a vehicle parked in parking lot in a high crime area at 4:50 a.m.), *with* Bozeman v. State, 397 S.E.2d 30, 32 (Ga. Ct. App. 1990) (finding reasonable suspicion where individual was observed "sitting for no apparent reason in a parked automobile in a remote part of a motel parking lot located in a 'high crime area' at 4:45 a.m."); *compare* People v. Shabaz, 378 N.W.2d 451, 459 (Mich. 1985) (finding no reasonable suspicion where individual in "high-crime area" left an apartment building known for drug activity carrying a paper bag, attempted to stuff it in his clothing, and ran on seeing plainclothes police officers in an unmarked car), *with* State v. Ratliff, No. 97-K-1054, 1997 WL 461496, at *1 (La. Ct. App. Aug. 13, 1997) (finding reasonable suspicion to stop individual who was standing with four men in an area known for drug activity, who exchanged objects with another man and began walking away when he saw police approaching); *compare* Commonwealth v. Espada, 528 A.2d 968, 969 (Pa. Super. Ct. 1987) (finding no reasonable suspicion to stop individual standing on a street corner in a high crime area), *and Banks*, 479 S.E.2d at 171 (finding no reasonable suspicion where nervous-appearing individual with his hand in his pocket was seen with two other persons on street corner at 7:00 p.m. in an area where drugs were frequently sold), *with* State v. Hall, 581 So. 2d 337, 338 (La. Ct. App. 1991) (finding reasonable suspicion to stop three individuals standing on a street corner at 4:07 a.m. in an area where "shootings and fights" were regularly investigated); *compare* Smith v. Commonwealth, 407 S.E.2d 49, 51 (Va. Ct. App. 1991) (finding no reasonable suspicion to stop individual observed at 10:00 p.m. in area "where drugs were prevalent" who saw police and stuck something inside his sweatpants), *with* People v. Champion, 549 N.W.2d 849, 861–62 (Mich. 1996) (finding reasonable suspicion to stop individual with a criminal record in a "known drug crime area" who walked away from officers with his hands inside his sweatpants); *compare* Commonwealth v. Berment, 657 N.E.2d 1295, 1298 (Mass. App. Ct. 1995) (finding no reasonable suspicion where officers, called at 3:00 a.m. to an address on a report that a man was waving a gun, saw four individuals talking in the parking lot at that address: "The fact that four people were gathered around a motor vehicle at three o'clock in the morning 'just talking' does

area, sitting in a car in a parking lot late at night may create reasonable suspicion in Georgia, but not in Tennessee,[78] and standing on a street corner may create reasonable suspicion in Louisiana, but not in Pennsylvania,[79] even though these jurisdictions apply the same standard.[80]

The inconsistency of these cases might be justifiable if the contexts of different areas made possible the drawing of different inferences from similar conduct.[81] Reasonable suspicion determinations turn on context; the same conduct could produce different inferences in different environments. But the cases, by and large, reflect no such analysis of context, no richer texture that explains why the observed behaviors justified the conclusion that reasonable suspicion was present in some places but not in others. Prosecutors do not offer, and courts do not seem to demand, evidence of any relationship between the unique circumstances of the community and police conclusions regarding the likelihood of wrongdoing.[82] The confusion of

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not point either to criminal activity or to the defendant."), *with* United States v. Chan, 901 F. Supp. 480, 482–83 (D. Mass. 1995) (finding reasonable suspicion to stop individuals seen at location where a man with a gun had been reported); *compare Fleming*, 415 S.E.2d at 783 (finding no reasonable suspicion to stop individual unknown to officer who was standing with a companion at 12:10 a.m. in a housing project "where 'crack' cocaine and other contraband was sold on a daily basis" and the two were walking away from officer), *with* United States v. Constantine, 567 F.2d 266, 266–67 (4th Cir. 1977) (finding reasonable suspicion to stop person unknown to officer in area with high incidence of vandalism); *compare* Stewart v. State, 953 S.W.2d 599, 600 (Ark. Ct. App. 1997) (finding no reasonable suspicion based solely on fact that woman was standing outside her home in a "high drug traffic" area at 1:45 a.m.), *with* Jackson v. State, 804 S.W.2d 735, 737 (Ark. Ct. App. 1991) (finding reasonable suspicion to stop person who was standing in front of an abandoned grocery store in a high-crime area at 9:45 p.m.).

[78] *Compare Bozeman*, 397 S.E.2d at 32, *with Williams*, 854 S.W.2d at 103–06.

[79] *Compare Hall*, 581 So. 2d at 338, *with Espada*, 528 A.2d at 969.

[80] The Supreme Court's conclusion in *Ornelas v. United States*, 517 U.S. 690 (1996), that reasonable suspicion determinations should be subject to de novo review was premised on the notion that cases could provide useful precedent for other similar fact situations. *See id.* at 697–98. However, Justice Scalia, dissenting, noted the "futility of attempting to craft useful precedent from the fact-intensive review demanded by determinations of probable cause and reasonable suspicion." *Id.* at 703.

[81] For example, an officer might testify that a gesture had a particular and unique association with criminal conduct in a particular neighborhood.

[82] Some of the cases finding no reasonable suspicion on these facts may be explained in other ways. In some, the conclusion that reasonable suspicion is lacking is not fatal to the case. *See, e.g.*, United States v. Sprinkle, 106 F.3d 613, 615–16 (4th Cir. 1997). Mr. Sprinkle was seen getting into a car one afternoon with an individual who had been out of prison for only a few months, in a "neighborhood known by the police for considerable narcotics trafficking." *Id.* at 616. Police then saw Mr. Sprinkle and the driver of the car "huddling and talking," and observed the driver "put his head down and put his hand to the left side of his face as if to conceal his face" from the officer. *See id.* (internal quotation marks omitted). The officers could see the hands of both men and did not observe any drugs, money, weapons, or drug paraphernalia. The car drove away at the

same time an officer walked by. Officers stopped the car and patted down Mr. Sprinkle, who broke free and ran. He ultimately drew a gun and fired at an officer. Mr. Sprinkle was arrested and charged with possessing a firearm after conviction for a felony. The court of appeals held that there was no reasonable, articulable suspicion of criminal conduct on the part of Mr. Sprinkle, but that his criminal response to the officers rendered his arrest appropriate notwithstanding the illegality of the initial stop. *See id.* at 619; *see also* Booth v. State, No. 01-95-0043-CR, 1996 WL 37810 (Tex. Ct. App. Jan. 29, 1996) (holding there was no reasonable suspicion to stop defendant on citizen complaint that "some people" at a strip mall known for drug activity were selling drugs and defendant was outside the strip mall motioning to cars, but the discovery of an outstanding warrant for the defendant's arrest rendered his otherwise improper detention lawful).

Some cases reflect the courts' dissatisfaction with police consideration of the race of the defendants as an element in the development of reasonable suspicion. Interestingly, it is often white defendants who benefit in these circumstances. *See, e.g.*, People v. Bower, 597 P.2d 115, 117 (Cal. 1979) (holding there was no reasonable suspicion to stop "a white man . . . with a group of black men in a black residential area at 8:37 p.m." where the officer testified that he had "'never observed a white person in the projects or around the projects on foot in the hours of darkness or [sic] for innocent purpose'" and officer "'thought either narcotics or weapons were involved, due to the hour and a white male being in the projects with these other people'"). The court vehemently rejected the use of race to create reasonable suspicion and was eloquent about the impermissibility of using the character of the neighborhood to elevate suspicion of criminality:

> Finally, the officer's assertion that the location lay in a "high crime" area does not elevate these facts into a reasonable suspicion of criminality. The "high crime area" factor is not an "activity" of an individual. Many citizens of this state are forced to live in areas that have "high crime" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual.

Id. at 119; *see also* New v. State, 674 So. 2d 1377, 1378 (Ala. Crim. App. 1995) (finding no reasonable suspicion where three white youths were driving at 3:30 a.m. below the speed limit with no apparent destination in a predominantly black neighborhood in which automobile burglaries had recently occurred and one of the passengers looked back at the officer a few times); State v. Bodereck, 549 So. 2d 542, 544–46 (Ala. Crim. App. 1989) (finding no reasonable suspicion to stop vehicle containing two white males in a Cadillac, in an area that "had a reputation for extensive drug activity," where the white males spoke to a black male leaning into the passenger side of the car, and the black male appeared to engage in evasive behavior upon seeing the officer); State v. Weitman, 525 P.2d 293, 294 (Ariz. Ct. App. 1974) (finding no reasonable suspicion to stop vehicle which slowed down briefly in front of a public tavern; trial court excluded testimony that car contained two white men and a young African-American man in a "predominantly" black area and that the tavern had a reputation for drug trafficking); State v. Nealen, 616 N.E.2d 944, 945 (Ohio Ct. App. 1992) (finding no reasonable suspicion where police observed a young white male in an "all black," "extremely high crime area," with his hand closed in a fist). For a thorough discussion of the consideration of race in the decision to stop, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 138–63 (1997); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 429–30 (1997); Erika L. Johnson, *"A Menace to*

the case law in which courts consider the character of the neighborhood in making reasonable suspicion determinations suggests that existing standards provide no consistent and reproducible guidance for the courts or the police in the case-by-case application of these principles.[83] Moreover, notwithstanding a model based on individualized suspicion and careful and detailed police observation,[84] some courts seem to approve stops supported by little in the way of particularized observations and justified largely by the character of the neighborhood. The standard, as applied in these cases, in effect allows police to stop anyone in a high-crime neighborhood. Such outcomes question the power of the existing standard to provide an effective and enforceable limit on police discretion. At the same time, the fact that other courts reject claims of reasonable suspicion on comparable facts suggests the need for a clearer and more consistently applicable rule that addresses what the character of the neighborhood can add to the reasonable suspicion inquiry.

III. RECONSIDERING THE USE OF THE CHARACTER OF THE NEIGHBORHOOD TO ESTABLISH REASONABLE SUSPICION

Part II reflects the incoherence of the cases in which the character of the

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Society:" The Use of Criminal Profiles and its Effects on Black Males, 38 HOW. L.J. 629, 653, 655–57 (1995); Johnson, *supra* note 63.

[83] The state will sometimes offer evidence of the character of the neighborhood for criminality where the other evidence in support of the reasonable suspicion determination is sufficiently substantial that it makes such evidence unnecessary. *See, e.g.*, Goldsmith v. State, 405 A.2d 109, 111 (Del. 1979) (finding reasonable suspicion to stop defendant's automobile in an area where there was "frequen[t] . . . criminal activity related to the use of alcohol and drugs" where defendant struck another vehicle while pulling out of a parking space); Allen v. State, 584 A.2d 1279, 1284 (Md. Ct. Spec. App. 1991) (finding reasonable suspicion where individual matched highly specific description and location of a person anonymous tipster had reported was in possession of a gun; area was "notorious for its drug activities, shootings, and homicides"). In these cases, the consideration of evidence about the character of the neighborhood might be viewed as superfluous, since the stop would have been permitted anyway. This Article therefore focuses on those cases in which the evidence about the character of the neighborhood supplies the critical link that elevates the particularized observations to reasonable suspicion, for it is most critical to consider the neighborhood evidence appropriately in those cases.

For this reason, this Article does not address the consideration of the character of the neighborhood in the context of probable cause determinations. Although such evidence is considered in probable cause determinations as well, given the greater showing required to demonstrate probable cause, the likelihood that a probable cause determination will be based in large part on evidence about the character of the neighborhood for criminality is relatively slim, making inappropriate use of such evidence less of a concern.

[84] The paradigmatic cases reflecting the pattern of elaborate observation and inference appropriate to a determination of reasonable suspicion are *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Cortez*, 449 U.S. 411 (1981).

neighborhood is a significant part of the reasonable suspicion determination. This confusion might suggest that consideration of the character of the neighborhood should be abandoned as a pertinent factor in the reasonable suspicion inquiry. That conclusion would be premature. To understand how the neighborhood can properly be considered in making reasonable suspicion determinations, we must first address how this factor is relevant to that determination.

A. *Relevance of the Character of the Neighborhood*

Is the character of the neighborhood relevant to a determination of reasonable suspicion? Of course the neighborhood's character is "relevant," in the narrative sense. It is part of the story—part of the "totality of the circumstances"—and it provides the context in which the stop took place. But in the sense of formal proof, how does the character of the neighborhood tend to make more probable[85] the existence of reasonable suspicion?

First, in a purely probabilistic sense, the character of the neighborhood for criminality may increase the probability that an actor in that neighborhood is engaged in criminal activity. Remember the neighborhood from Part II (A) in which one in three persons was likely to be in possession of narcotics? A person walking down the street in such a neighborhood may, all else being equal, be more likely to be involved in criminal activity than someone who is engaged in the same conduct in a different neighborhood.

The practical utility of this information is limited. It is unlikely that such probability can be accurately assessed; even the most crime-ridden neighborhoods are populated with law-abiding citizens.[86] But purely as a matter of theoretical

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[85] This is the relevance standard of the Federal Rules of Evidence, which provide: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. For a demonstration of a Bayesian model of relevance, see Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1022–32 (1977).

[86] Proponents of the benefits of aggressive law enforcement for the black community have made precisely this argument: that increased enforcement benefits the high volume of innocent citizens living in these communities. *See* KENNEDY, *supra* note 82, at 11–12; *see also* United States v. Atlas, 94 F.3d 447, 453 (8th Cir. 1996) (Arnold, C.J., dissenting) (rejecting claim that seeing an individual, who was surprised to see police, drop a bag to the ground with a thud in an area "high in gang activity" provided reasonable suspicion to believe there was an illegal object in the bag, and noting "[w]e should remember that people who live in such neighborhoods are probably the most frequent victims of such activity. I do not believe that they should indiscriminately be considered dangerous"); People v. Hampton, 606 N.Y.S.2d 628, 630 (N.Y. App. Div. 1994) ("[L]ocation alone does not justify police intrusion against citizens who happen to live, work, or travel in such 'high crime areas.'"); United States v. Bennett, 514 A.2d 414, 419 n.3 (D.C. App. 1986) (Mack, J., dissenting):

relevance, such proof is possible.

Second, information about the character of the neighborhood for particular types of criminal behavior could demonstrate the required nexus between the observed conduct and the likelihood of criminal activity. Approaching cars at a street corner can be probative of a car wash or a narcotics transaction; information about the character of the neighborhood provides additional information that can contextualize observations and make them meaningful.[87] This, in turn, affects the probability that the individual is involved in criminal activity.[88]

> Regrettably, it is necessary to remind again that thousands of citizens live and go about their legitimate day-to-day activities in areas which surface, sometimes surprisingly, in court testimony, as being high crime neighborhoods. The fact that the events here at issue took place at or near an allegedly "high narcotics activity" area does not objectively lend any sinister connotation to facts that are innocent on their face.

Id.

[87] *See, e.g.*, People v. Sierra, 638 N.E.2d 955, 956 (N.Y. 1994). Officers patrolling an area known as a "narcotics supermarket" for New Jersey residents observed a man exit a parked vehicle with New Jersey plates, walk toward an individual in response to his call of "over here, over here," then turn and walk away on spotting the police. The conduct—beckoning to an out-of-state driver, then walking away on seeing the police—might have been innocent, but was more likely to be criminal in the context of information about particular types of criminal activity seen frequently in the neighborhood. *See also* Lambright v. State, 487 S.E.2d 59, 61 (Ga. Ct. App. 1997) (finding reasonable suspicion when police observed a "hand-to-hand exchange" in a high-crime area and noting "[a]lthough Lambright contends the exchange was susceptible to many innocent interpretations, . . . this behavior, coupled with Alexander's standing in the mode of a seller at a known 'stop and cop' location, provide the indicia to justify the investigatory detention").

[88] The assumptions that underlie this analysis could be empirically challenged. An assumption that certain behaviors are more indicative of criminal behavior in a high-crime neighborhood than they would be in a neighborhood with a low crime rate may simply not be borne out by empirical evidence. Professor Sheri Lynn Johnson outlined the implicit fallacy in this probabilistic assumption:

> [E]ven the information that a neighborhood has many drug transactions does not insure that a street exchange occurring in that neighborhood is more likely to be a drug deal than is an exchange in an ordinary neighborhood. In order to increase the probability of a *particular* exchange's being drug-related, a higher *proportion* of street transactions in the drug-prone area (not merely a higher number) must involve controlled substances. An equation between number and proportion requires the additional empirical assumption that the drug-prone neighborhood has the same number of street exchanges as does the control neighborhood. Since most poor neighborhoods have substantially more street activity than do suburban neighborhoods—both innocent and culpable—this assumption is improbable. A weaker assumption is possible: The high drug traffic area has proportionately less additional street activity than additional drug sales. This assumption, if correct, would also give the factor of neighborhood predictive power, but the lesser weight should be acknowledged.

The character of the neighborhood for criminality thus can be relevant to the reasonable suspicion determination and cannot be excluded from it entirely. At the same time, it cannot support a determination of reasonable suspicion on its own. The two ways in which it is relevant—as evidence of "pure probability" and as a factor tending to show the nexus between particularized observations and suspected criminality—reflect the need to couple these observations with meaningful particularized observations. Yet testimony about the neighborhood's character for criminality is compelling and may tend to elevate any particularized observation to reasonable suspicion. How can the use of the character of the neighborhood for criminality in the reasonable suspicion inquiry be governed so that such evidence does not become the sole basis for a determination of reasonable suspicion?

B. *Devising the Appropriate Standard: Considering Law-Abiding Behavior in the Neighborhood*

The "neighborhood plus" cases have the necessary inquiry precisely backwards. By allowing the evidence of the character of the neighborhood to dominate the reasonable suspicion inquiry, courts may become predisposed to believe the worst of persons found there and, accordingly, to accept the most minimal particularized observations as sufficient to support a determination of reasonable suspicion. But if those particularized observations merely identify behavior in which law-abiding persons in the area routinely engage, they do nothing to narrow the class of "stop-eligible" persons, as the reasonable suspicion inquiry requires.[89] If standing on a street corner or sitting in a parked car are observations sufficiently "particularized" to create reasonable suspicion in a high-crime neighborhood, then practically every person in that neighborhood will be subject to stop. The standard applied to these cases must incorporate consideration not only of criminal behavior, but also of law-abiding behavior, and must address how law-abiding persons conduct themselves in the neighborhoods where the stops take place.

The standard I propose is that courts may consider evidence about the character of the neighborhood for criminality in evaluating a determination of reasonable suspicion only when the particularized observations of the individual in question, offered in support of the claim of reasonable suspicion, relate to behavior that is not common amongst law-abiding persons at the time and place observed.

Behavior that would typically be observed amongst law-abiding persons could not by itself support a finding of reasonable suspicion, for it would violate the

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Johnson, *supra* note 63, at 221–22 & n.42 (italics in original).

[89] *See supra* notes 40–41 and accompanying text; *see also* Maclin, *supra* note 9, at 1324: "[P]olice officials should not be free to effect seizures based upon factors allegedly possessed by those engaged in criminal conduct, but also shared by a significant percentage of innocent persons particularly when those factors concern characteristics like race and age."

requirement that reasonable suspicion narrow the stop-eligible class of persons. If such behavior is observed in a high-crime neighborhood, the character of the neighborhood for criminality may bootstrap the observations to reasonable suspicion. To avoid this, the standard requires that the behavior have *some* potential to narrow the stop-eligible class before the character of the neighborhood is taken into account. This constraint permits the consideration of relevant contextual information in the totality of the circumstances inquiry, while meaningfully enforcing the requirement of *Brown v. Texas* that stops not be justified purely on the basis of the character of the neighborhood.

How will the standard operate in practice? A court asked to consider the character of the neighborhood in evaluating a reasonable suspicion determination should first assess the particularized observations offered in support of that determination. If those observations are behaviors common among law-abiding persons in the neighborhood, they fail to narrow the stop-eligible class in any meaningful way. If that is the case, the character of the neighborhood for criminality should not be considered. The particularized observations must narrow the "stop-eligible" class before the court may take the character of the neighborhood into account.[90] If, however, the particularized observations offered in support of the reasonable suspicion determination include behavior not common among law-abiding persons in the neighborhood at the time and place they are observed, the court may then proceed to consider the character of the neighborhood for criminality in reviewing the reasonable suspicion determination.[91]

This constraint flows naturally from the principles governing determinations of reasonable suspicion. It meaningfully enforces the requirement that reasonable suspicion be supported by particularized observation. If the particularized behavior observed does not distinguish the individual stopped from the rest of his neighborhood, the inquiry must come to an end; if he can be stopped, so can everyone who lives in his community, and the limiting function of the reasonable suspicion inquiry is lost. If, on the other hand, his behavior is not common among law-abiding persons in the community, then the character of the neighborhood can be considered in the totality of the circumstances to assess whether reasonable suspicion is present.

The primary practical concern with this approach is that it relies to some extent on police good faith. Police officers who wish to sustain improper stops, who know

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[90] The particularized observations need not themselves amount to reasonable suspicion, because that would effectively foreclose the consideration of the character of the neighborhood for criminality in the reasonable suspicion determination. But they must offer some basis to differentiate the observed individual from law-abiding citizens in his community.

[91] "Common" behavior need not be behavior in which all law-abiding persons engage, but it should be sufficiently prevalent that no inference of wrongdoing can properly be drawn from it. What constitutes "common" behavior would certainly require further judicial development.

what the standard requires, and who are willing to bend the truth will simply testify that the behaviors they observed, however ordinary, are, in fact, not common among law-abiding persons in the neighborhood. The result will be the same neighborhood-dependent outcomes we sometimes observe under the current rule, with no increase either in fairness or uniformity.

The first answer to this challenge is that it is endemic to the endeavor of regulating police conduct. Any approach to enforcing constitutional limitations on police intrusion on citizens turns in large part on police good faith. Any legal doctrine will be defeasible by police officers intent on ignoring the applicable legal standard. An actor aware of the legal standard that will be applied to evaluate his conduct after the fact can tailor his description of the conduct to make it best fit that standard. Police officers, who are presumed to know the standards applied to assess the legality of their conduct, are certainly as able as other actors in the legal system to tailor their testimony to suit those standards. This Article's recommendation assumes that, for the most part, police officers will attempt to conduct themselves lawfully and to testify truthfully. Admittedly, this is an oversimplifying assumption, but the enterprise of crafting legal rules to govern police conduct is futile without it.

Moreover, the inquiry required by the standard I propose—which asks factfinders to assess whether particular behaviors are common among ordinary, law-abiding persons—is somewhat more perjury-resistant than the existing standard for two reasons. First, factfinders may feel less compulsion to defer to police testimony about how law-abiding people ordinarily behave than about issues requiring police expertise. One can imagine a judge responding skeptically to testimony from a police officer that in a particular neighborhood, walking, standing, or sitting are simply not behaviors commonly engaged in by law-abiding persons. Second, such testimony from police officers, should it be forthcoming, could be countered by evidence of conditions in the community, including testimony of longstanding community residents or videotape or still photographs. Behaviors of law-abiding persons are matters as to which community residents can be experts. The creativity of lawyers and the tolerance of judges will set the limits on appropriate evidence of common community behaviors, but the possibility of pertinent evidence from witnesses other than police officers creates a way for defendants to counter false or misleading police testimony.

C. *Advantages of Considering Law-Abiding Behavior in the Neighborhood*

The approach advanced in this Article offers a first step towards a superior way to address the volume of reasonable suspicion cases in which the character of the neighborhood for criminality plays a significant role in the reasonable suspicion

determination.[92]

1. *Analytical Guidance in Hard Cases*

The approach advocated by this Article provides a useful tool that will assist in the decision of reasonable suspicion cases that are close to the margin.[93]

Consider, for example, cases which address whether flight in a neighborhood known for drug or other criminal activity can support a finding of reasonable suspicion. Courts disagree about the significance of this factor.[94] The inconsistent

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[92] This standard enhances the likelihood that reasonable suspicion will be found in cases involving extraordinary behavior. *See, e.g.*, Nixon v. United States, 402 A.2d 816, 818 (D.C. App. 1979) (finding reasonable suspicion to stop individual who was looking intently into parked cars as he walked down the street in a neighborhood that had "recently . . . experienced several larcenies (including ones from automobiles)," when he appeared to be carrying, concealed in a newspaper, a box which he had not previously been carrying); Commonwealth v. Ellis, 335 A.2d 512, 513–14 (Pa. Super. 1975) (finding reasonable suspicion to stop individual carrying a checkwriting machine in high crime neighborhood at 2 a.m.). The standard may not be necessary in such cases, which seem to rely on the character of the neighborhood for criminality to supply the nexus between the particularized observations and the inference of criminality.

[93] This is not to say that this approach will eliminate hard cases. The line-drawing function the courts serve in these cases will always be difficult. But standardless approaches do not always make such determinations easier. A guided inquiry will help structure the decisionmaking process in these cases to provide more reliable and reproducible outcomes.

[94] This remains true, notwithstanding Justice Scalia's Bible-based confidence in its significance, as expressed in *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991). *Compare* People v. Rahming, 795 P.2d 1338, 1342 (Col. 1990) (en banc) (finding no reasonable suspicion where three young men, dressed as Crips, seen near an apartment building with a high crime rate ran on seeing police; "[a]n individual's attempt to avoid coming in contact with a police officer does not, without more, justify an investigative detention of the individual"); Grant v. State, 596 So. 2d 98, 99 (Fla. Dist. Ct. App. 1992) (finding no reasonable suspicion where individual was standing in a group of people at 2:00 a.m. in a high drug activity area and the individual fled when he saw police), *and* People v. McFadden, 524 N.Y.S.2d 902, 903 (N.Y. App. Div. 1988) (finding "fact of flight" an insufficient basis for pursuit where there is no "additional indicia of criminal activity"), *with* State v. Shahid, 813 S.W.2d 38, 39 (Mo. Ct. App. 1991) (finding reasonable suspicion to stop individual seen, with a companion, in an area with a "high incidence of drug possession and sale offenses," at a location where the officer had made twenty arrests within the past year, and the individual fled).

The argument that flight alone cannot support reasonable suspicion is logically founded on the idea that, at the stage where an officer could not compel cooperation, an individual's flight simply anticipates refusal to cooperate with the officer's potential decision to stop. *See, e.g.*, People v. Holmes, 619 N.E.2d 396, 398 (N.Y. 1993) ("Flight alone . . . or even in conjunction with equivocal circumstances that might justify a police request for information . . . is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry.") Some cases stretch the notion that "flight" suffices to provide reasonable suspicion, so that merely walking away from the scene is deemed "flight." *See, e.g.*, State v. Butler, 415 S.E.2d

and unpredictable outcomes in these cases may stem from the courts' failure to ask the right question, which is whether flight in the presence of police is sufficiently uncommon among law-abiding persons in the community that it effectively narrows the stop-eligible class. If so, then the character of the neighborhood for criminality may be considered in evaluating whether reasonable suspicion is present; if not, then it may not.[95]

Or consider cases in which the courts must address whether there is reasonable suspicion to stop someone present in a neighborhood with a high incidence of residential burglaries. The outcomes in these cases are inconsistent and unpredictable under current doctrine, with some courts finding reasonable suspicion[96] and others concluding this is a prohibited neighborhood-based stop.[97] Requiring the courts to consider first whether the observed behavior is common among law-abiding persons in the community at the time and place observed, before considering the character of the neighborhood, can distinguish helpfully between these cases.

This approach not only helps to produce appropriate answers, but to ask

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719, 722 (N.C. 1992) (finding reasonable suspicion to stop individual police observed on a street corner known as a "drug hole," where individual made eye contact with officer, then immediately turned and walked away). For a discussion of the cases in which "location" plus "evasion" of the police are deemed adequate for reasonable suspicion, see Harris, *supra* note 4.

[95] The legitimacy of the use of a factor like evasive conduct thus may depend on how typical it is among law-abiders in the community. If everyone in a particular neighborhood would habitually avoid a particular police officer, under the approach proposed here, the court could not go on to consider the character of the neighborhood for criminality as part of the reasonable suspicion determination. This would produce an interesting result: that evading police officers might be more likely to justify an investigative stop in those communities where such evasion was not common behavior. The court in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996), elicited a substantial furor by trying to raise this suggestion. In his first opinion, Judge Harold Baer responded to the government's claim that the police had reasonable suspicion to stop a vehicle when they observed men placing duffel bags in the back of the suspect's car and then fleeing when they saw the officers. In addition to questioning the officer's credibility on this issue, the judge noted that "residents in this neighborhood tended to regard police officers as corrupt, abusive and violent" and that "had the men not run when the cops began to stare at them, it would have been unusual." *Bayless*, 913 F. Supp. at 242. The resulting hubbub produced the reference in the second opinion to the first as "hyperbole" that "regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City." 921 F. Supp. at 217. Judge Baer's position may be more substantively read not as a disparagement of the police but as a reference to the need for distinctive particularized observations to support stop-eligibility.

[96] *See, e.g.*, United States v. Rickus, 737 F.2d 360, 367 (3d Cir. 1984); State v. Dean, 645 A.2d 634, 636 (Me. 1994).

[97] *See, e.g.*, United States v. Kerr, 817 F.2d 1384, 1387 (9th Cir. 1987); Harris v. State, 568 So. 2d 421, 424 (Ala. Crim. App. 1990).

appropriate questions. By refocusing the inquiry not on generalized observations about the community, but on particularized observations of the individual and how his behavior sets him apart from the rest of the neighborhood, the test is truer to the underlying tenets of the reasonable suspicion standard. Under the current "neighborhood-plus" cases, much of the attention has focused on the neighborhood, making the individualized observations of the suspect almost an afterthought. The proposed inquiry places a premium not on targeting a community, but on understanding that community and appreciating the nuances that distinguish ordinary behavior in that context from behavior that merits police intervention.

In turn, the approach provides clearer guidelines for officers in the field. To find reasonable suspicion, it is not enough to suggest that the character of the neighborhood for criminality renders common behavior suspect; instead, an officer must identify behavior in which law-abiding persons do not routinely engage before the neighborhood's character for criminality can be brought into the reasonable suspicion determination.

2. *Logical Consistency*

The approach advocated in this Article avoids the logical fallacy apparent in some of these cases, best summarized by example: "X is standing on a street corner. Many drug dealers stand on this street corner. Therefore, X is a drug dealer."[98] The problem, of course, is that no inquiry is made into how often the observed behavior does *not* correlate with criminal behavior, making the anecdotal testimony a useless measure of probability.

An example may be useful here. Suppose a police officer stops and frisks 1000 persons on a particular street corner over the course of a year and finds ten individuals in possession of narcotics there. For the officer to testify only that he has made ten arrests at that very corner—and, in addition, to testify that the corner is widely known as a drug supermarket—may overstate the significance of seeing suspect number 1001 on the same corner.

Police testimony in the neighborhood cases often follows this pattern.[99] It

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[98] This is analogous to the "[f]allacy of [a]ffirming the [c]onsequent." IRVING M. COPI, INTRODUCTION TO LOGIC 202 (3d ed. 1968).

[99] *See, e.g.*, People v. Washington, 192 Cal. App. 3d 1120, 1123 (Cal. Ct. App. 1987) (officer testified that in four years as a patrolman he had made at least 100 cocaine arrests in area frequented by the defendant); State v. Watson, 458 S.E.2d 519, 521 (N.C. Ct. App. 1995) (holding that stop of individual who was observed putting something into his mouth in front of Josh's Convenience Store was not supported by reasonable suspicion despite officer's testimony "that he had made approximately fifty cocaine arrests in the vicinity of Josh's Convenience Store"); Malvo v. State, No. 01-94-00311-CR, 1995 WL 752458, at *6 (Tex. Ct. App. Dec. 21, 1995) (upholding as based on reasonable suspicion stop of suspect sitting on chair in driveway at 2:00 a.m.; officer testified that in "[m]aybe a fourth of the cases" where he had "made" a narcotics case,

focuses, logically enough, on the number of times the observed behavior, in the officer's experience, correlated with confirmation that the suspect was engaged in criminal conduct,[100] without suggesting anything about how often comparable suspicions were proved groundless or how often those observed behaviors correlated with persons generally believed by the officer to be law-abiding.[101] Asking how often the suspect's behavior in a particular neighborhood correlates with unlawful behavior without asking how often it correlates with lawful conduct creates a skewed and incomplete picture of the probability of criminal conduct generated by this evidence. Requiring that the behavior observed be distinguishable from behavior prevalent in the law-abiding community brings this half of the equation into focus.

One might assume that such errors would be addressed aggressively on cross-examination and would be detected and addressed adequately by the courts. The courts' deference to police determinations of reasonable suspicion is a significant barrier to such a result. Although courts do not explicitly defer to the police in the application of the legal standard to the facts, they routinely defer to police judgment with regard to the significance of the observed facts,[102] requiring that the evidence

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a chair was involved); *see also* Tucker v. State, 667 So. 2d 1339, 1345–46 (Ala. 1995). The officer there argued that the fact that the defendant had a 35 mm film canister provided probable cause to believe there were narcotics in it, based on the officer's experience that he had "probably seen several hundred" such canisters containing narcotics. The court rejected the inference:

> Drugs may be possessed and transported in all kinds of containers. Anyone may purchase 35mm film in canisters at a retail store. The primary purpose of film canisters is to hold film, and all such canisters are at least initially used for that purpose. The fact that an officer has first-hand experience with film canisters containing narcotics cannot provide probable cause to open each film canister he may encounter. Nor does the added factor that a film canister is found on a person in a high crime area provide probable cause to open it without a more articulable basis upon which a reasonable person could conclude that the particular canister contained narcotics. Allowing a search in such a situation without requiring a more articulable basis, would be allowing a warrantless search based on mere suspicion.

Id. at 1346.

[100] *See, e.g.*, State v. Ellington, 680 So. 2d 174, 177 (La. Ct. App. 1996) (Byrnes, J., dissenting) ("This area, from my experience that I've [been] assigned to the Eighth District for about seven years now, made numerous arrests in that area on those corners . . . for prostitution and narcotics trafficing [sic] . . . .").

[101] *See, e.g.*, State v. Ozanne, No. 14208-6-111, 1996 WL 312164, at *2 (Wash. Ct. App. June 6, 1996) (holding there was reasonable suspicion to stop driver of vehicle in area known for frequent drug transactions; officers testified that conduct of driver "was the same conduct observed by them numerous times when people stop to buy drugs in that area").

[102] *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996). Although ruling that determinations of reasonable suspicion should be reviewed de novo, the court took care to distinguish the underlying facts, noting that "[t]he background facts provide a context for the

"be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[103] The deference to police judgment with regard to the interpretation of these observations is inconsistent with penetrating review of the police conduct.[104] The novel framework I urge in this Article respects deference to police experience while encouraging the development of police expertise about the whole community and providing the courts with a fuller and fairer basis for evaluating the officer's decision in the context of the norms of law-abiding behavior in the particular neighborhood.

Devotees of the "decision heuristics" literature[105] might view these cases as an example of the "heuristic of representativeness"—the empirically supported claim that decisionmakers engaged in probabilistic decisionmaking tend to focus disproportionately on the degree to which the example they are asked to consider is "representative" of a stereotyped model rather than addressing the statistical likelihood of the behavior the model represents in the general population.[106] This literature argues that persons who make probabilistic decisions disregard information about the frequency of that behavior in the general population (the so-called "base rate") in favor of information that correlates with their stereotypic perceptions,[107] and that this disregard causes them to systematically overestimate

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historical facts, and when seen together yield inferences that deserve deference." *Id.*; *see also* United States v. Trullo, 809 F.2d 108, 112 (1st Cir. 1987) (giving "appropriate deference" to officer's judgment that a "clandestine transaction" took place where defendant spoke to a pedestrian, the pedestrian got into defendant's car and drove with him to a deserted side street, conversed briefly, then exited the vehicle and walked away).

[103] United States v. Cortez, 449 U.S. 411, 418 (1981).

[104] Appellate courts are hampered in this task by the inadequacy of the records on which they are asked to make their determinations. *See* State v. Valentine, 636 A.2d 505, 514 (N.J. 1994) (Clifford, J., dissenting) ("This case strikes me as not much more than a challenge to our ingenuity in teasing out of this slim record a range of nuances of conduct and speech that lead to a result favoring either admissibility or suppression.").

[105] The substantial body of scholarship in the area of "decision heuristics" argues that intuitive decisionmaking by humans is subject to persistent, systematic flaws which cause human perceptions of probability to differ from actual probability. *See* Saks & Kidd, *supra* note 42, at 127 ("Abundant evidence from psychological research . . . suggests that in many contexts decision makers' intuitive, commonsense judgments depart markedly . . . from the actual probabilities."). These flaws are termed "heuristic biases." *Id.* at 130–31.

[106] The heuristic of representativeness is the empirically supported observation that, in making determinations that require them to judge the likelihood of a particular possibility, human beings tend to "overestimate the probabilities of representative . . . events and/or underestimate the probabilities of less representative events." Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 311 (1983).

[107] *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). This principle is empirically demonstrated by experimentally

the likelihood of the stereotypic behavior. The classic example is of psychiatric experts assessing the likelihood that a particular individual suffering from a psychiatric disorder is likely to be dangerous if released from hospitalization. The heuristics literature argues that while, as a statistical matter, this assessment should take into account information about the population in general, specific information about the individual case, and the expected accuracy of prediction,[108] decisionmakers will actually make this decision in large part by considering the resemblance of the suspect in question to a stereotyped dangerous patient without much consideration of the incidence of dangerous behavior in the general population, thereby overstating the likelihood of dangerousness in the particular case.[109]

The decision heuristics literature has been widely challenged on a number of fronts.[110] To the extent this literature identifies a phenomenon of concern, however,

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manipulating the base rates. Given the description of an individual, subjects were asked to assess the likelihood that the individual was a lawyer or engineer and were told the proportion of lawyers and engineers in the group from which the individual was said to be drawn. Given descriptive material that the subjects viewed as representative of the categories, the subjects assessed probabilities based almost entirely on representativeness, with "little or no regard for the prior probabilities of the categories." *Id.* at 1125.

The claimed implications of these studies have been vigorously disputed. *See* Gerd Gigerenzer, *How to Make Cognitive Illusions Disappear*, *in* 2 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 83, 92–101 (1991). He asserts that the failure of the subjects of the Kahneman and Tversky studies to follow the rules of probability comes from the experimenters' failure to pose the questions so that the subjects deal with the statistical frequencies of outcomes rather than being expected to apply the rules of probability to individual situations where they are not meaningful. "Probability theory is about frequencies, not about single events. To compare the two means comparing apples with oranges." *Id.* at 88. He further argues that where subjects are asked questions that require them to evaluate frequencies rather than particular instances, their behavior is much truer to the results probability would predict. In the context of the base-rate studies, Professor Gigerenzer asserts that the base-rate effect disappears if subjects are required to evaluate numerous descriptions, providing them with the frequency that brings the rules of probability into play. Although this may well be accurate, the problem with Professor Gigerenzer's analysis, for our purposes, is that, under current doctrine, actors in the criminal process—police officers and, later, judges—do not make decisions this way. If a court were asked to evaluate the separate likelihood that each of twenty individuals standing on a street corner in a high crime neighborhood were engaged in criminal activity, the decisionmakers might then view base-rate information as relevant. But that is not how decisions of this sort present themselves. The stop addressed by the court is typically that of a single individual or group of companions; the commitment of the decisionmaker to representativeness over base-rates is therefore at its apex.

[108] *See* Daniel Kahneman & Amos Tversky, *On The Psychology of Prediction*, 80 PSYCHOL. REV. 237, 239 (1973).

[109] *See* Saks & Kidd, *supra* note 42, at 133.

[110] For critiques based on challenges to the validity of the research design, see, for example, Gigerenzer, *supra* note 107, at 90–92. For criticism of the enterprise of converting process research

it is a phenomenon that would be relevant to reasonable suspicion determinations, which are often based on the degree to which observed behavior correlates with stereotypic criminal behavior.

Courts in reasonable suspicion cases are typically presented with testimony which evaluates the "representativeness" of the observed behavior. The representative conclusions are often expressly articulated by police witnesses. "'[A]nytime we enter the Five Points area, we see somebody move very quickly like that, they either have contraband or a weapon or something of that nature on them,'" one officer testified.[111] Often the degree of correlation with prior observations is asserted as an especially convincing basis for finding reasonable suspicion.[112] The mere fact that trained police officers make these judgments and that educated judges review them does not address the potential problem since the reported bias is not a

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into evaluation of subject performance, see Lola L. Lopes, *The Rhetoric of Irrationality*, 1 THEORY & PSYCHOL. 65 (1991). For a rejection of the assumption that probability theory accurately models real-world uncertainty, see Lola L. Lopes & Gregg C. Oden, *The Rationality of Intelligence*, *in* PROBABILITY AND RATIONALITY: STUDIES ON L. JONATHAN COHEN'S PHILOSOPHY OF SCIENCE 199, 199–225 (Ellery Eells & Tomasz Maruszewski eds., 1991).

[111] People v. Thomas, 660 P.2d 1272, 1276 n.2 (Colo. 1983) (en banc). Officers saw Mr. Thomas, who began to run. Police gave chase and followed Mr. Thomas into a building, where they saw him throw six cocaine-filled balloons into a water pitcher. The court held that there had been no reasonable suspicion to justify the stop of the defendant:

> Considering the universal character of the suspected activity—running a short distance and putting a hand in the pocket—any conclusion to be drawn from that activity alone would not be the type of reasonable inference . . . that *Terry* and its progeny require, regardless of the officer's opinion of the area as a "high crime area."

Id. (italics omitted).

The ultimate such testimony came in a California case, where the officer "answered in the affirmative when asked if most of the Black men he saw in the area usually had something to hide if they ran from police." People v. Washington, 236 Cal. Rptr. 840, 841 (Cal. Ct. App. 1987); *see also* State v. Brooks, No. 15394, 1997 WL 189462, at *2 (Ohio Ct. App. Apr. 18, 1997) (upholding pat-down of passenger in a car who leaned forward, leading officer to believe he was hiding or retrieving something under the seat; officer testified, "in my experience in the past 14 years, when someone is doing that, they're trying to hide something or retrieve something or it's either contraband or a weapon").

[112] *See* People v. Nelson, 505 N.W.2d 266, 268, 271 (Mich. 1993). In *Nelson*, the officer testified that the behavior he observed in this case, three men arriving by car at a house known to be the site of prior narcotics transactions and staying only four minutes, was a "carbon copy" of prior observed drug purchases. *See id*; *see also* United States v. Bennett, 514 A.2d 414, 419 n.2 (D.C. 1986) (Mack, J., dissenting) (noting that when the court asked the officer, "[W]hat made you think you had a drug sale?" the officer testified, "[W]e were near Crittenden and Decatur and Georgia Avenue, where it is dealing in PCP. That is where we normally catch them at . . . . They used the same pattern and the same method that they have sold drugs to undercover officers in the same way.").

function of lack of training or education.[113]

To the extent this phenomenon poses a problem, the proposed test addresses it by requiring courts to focus on asserted correlations with criminality, as well as baselines. Rather than permitting the conclusion that the base rate in a high crime neighborhood is 100%—in effect, that every person in that community is engaged in criminal behavior—the test requires a showing that something more than the character of the neighborhood is behind the determination of reasonable suspicion.[114]

3. *Fairness*

The approach is less likely to have a disparate impact on racial minorities. Poor people and people of color disproportionately live and work in less secure and more crime-ridden neighborhoods.[115] People found in "high-crime areas" or areas

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[113] Commentators have noted that "[t]he biasing effects of representativeness are not limited to naive subjects." Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430, 433 (1972). Indeed, "the same type of systematic errors that are suggested by considerations of representativeness can be found in the intuitive judgments of sophisticated scientists." *Id.* at 450.

[114] The heuristics literature also suggests that another heuristic—"availability"—causes decisionmakers' subjective assessments of the likelihood that particular events occurred to be influenced by the availability of such events in memory. *See* Saks & Kidd, *supra* note 42, at 137. The research underlying these conclusions about the availability heuristic is set forth in Amos Tversky & Daniel Kahneman, *Availability: a Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973). The best example for our purposes is a study in which subjects were presented with recorded lists of names, instructed to listen attentively, and then evaluate whether the list contained more men or women. The lists were designed to contain either women who were more famous and men who were less famous, or women who were less famous and men who were more famous. Of 99 subjects, 80 erroneously judged the class with the more famous names to be more frequent. *See id.* at 220–21.

To the extent the structure of criminal procedure law creates an availability heuristic in the judiciary by exposing courts primarily to criminal cases in which police intuition proved accurate, requiring the courts to focus on the behavior of law-abiding members of the community may encourage them to evaluate the possibility of outcomes they experience less frequently.

[115] *See* Harris, *supra* note 4, at 677:

> The "high crime areas" and "areas associated with high levels of drug activity" . . . are not, by any means, evenly distributed across urban areas. On the contrary, zones of high crime activity are concentrated in inner city neighborhoods . . . . These neighborhoods tend to be poorer, older, and less able to support jobs and infrastructure than either city neighborhoods more distant from the urban core or suburban locations . . . . It will not surprise anyone who lives or works in an urban center to learn that these areas share another characteristic in addition to the presence of crime: They are racially segregated. African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.

"known for drug trafficking" are, purely as a statistical matter, more likely to be people of color. A standard that considers being situated in a "high crime area" a substantial justification for a police stop disproportionately burdens residents of those communities,[116] subjecting residents of high crime areas to more stops on less suspicion. Using the character of the neighborhood as a factor in the determination of reasonable suspicion results in the consideration by proxy of the impermissible factors of race and poverty.[117] Even if the factor is not consciously used in this fashion, using this criterion will have a disproportionate impact on such communities.[118] In other contexts, some courts readily recognize that "neighborhoods" can be proxies for race.[119] The impact of using the character of the

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Id. (footnotes omitted); *see also* Johnson, *supra* note 63, at 238 (observing that "poverty and differential association opportunities probably coincide quite nicely with 'crime-prone neighborhoods'").

[116] *See* David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 44 (1994):

> [T]he automatic frisk cases—especially those that allow frisks based on the character of the neighborhood—paint an ugly picture: Minority group members can be not only stopped, but subjected to a frisk without any evidence that they are armed or dangerous, just because they are present in the neighborhoods in which they work or live.

Id. (italics omitted); *see also* Frenchman, *supra* note 63, at 1722 (arguing that *United States v. Rideau*, 969 F.2d 1572 (5th Cir. 1992) (en banc), "has significantly watered down the 'specific and articulable basis' aspect of the protective search standard and has caused legitimate concern that those in the lower economic ranks of society will lose the Fourth Amendment privacy protections extended to more affluent persons").

[117] *See* Johnson, *supra* note 63, at 256 ("[B]oth the factors of class and neighborhood may easily be used as facades for race; this possibility should induce additional reluctance about attaching substantial weight to their presence."); *see also* Harris, *supra* note 4, at 672–75 (arguing that "location" and "evasion" are used as proxies for race in reasonable suspicion determinations).

[118] Extensive writing addresses the biased application of facially neutral criminal procedure doctrines to people of color. *See, e.g.*, Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239 (1993) (arguing that determinations of consent to search should take into account race and socio-economic status of the consenter as well as information regarding his experiences and knowledge of police misconduct and the climate of police-community relations in his neighborhood).

There is a substantial and impressive literature on race and *Terry* stops. *See, e.g.*, Davis, *supra* note 82, at 429–30; Harris, *supra* note 4, at 672–74; Harris, *supra* note 116, at 44; Johnson, *supra* note 63; Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250–62, 268–71 (1991); Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of* Terry v. Ohio, 23 FORDHAM URB. L.J. 317 (1996); Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994).

[119] In the *Batson* context, the claim that neighborhood is a proxy for race has been recognized. *See, e.g.*, Lynn v. Alabama, 493 U.S. 945, 947 (1989) (Marshall, J., dissenting from

neighborhood for criminality as a substantial factor in the reasonable suspicion determination falls significantly on innocent residents of those communities.[120]

By contrast, requiring the courts to consider whether the observed conduct is common among law-abiding persons before they may consider the character of the neighborhood for criminality accomplishes two things. First, it requires that something other than the neighborhood be offered to substantiate the conclusion that there is reasonable suspicion that a particular individual is involved in criminal activity. This will limit the discriminatory impact of such stops. Second, it requires police to acquaint themselves with the norms of the neighborhoods they police. In order to understand what law-abiding persons are doing, they will need to know the neighborhood, know the habits and practices of its citizens, and recognize deviations from the law-abiding norm based on factors other than race.

The current focus on community policing stresses values consistent with this approach. By emphasizing the need to recognize the "distinctive experience, needs and norms of local communities,"[121] the movement recognizes the importance of officers creating bonds of understanding and knowledge with particular communities.[122] The shift away from "crime-fighting" in favor of working with

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denial of certiorari) (permitting prosecutor, in capital case, to exercise peremptory challenges based on the neighborhoods in which jurors lived: "In a small community with racially identifiable neighborhoods, an individual's address closely corresponds to his or her race"); *see also* United States v. Bishop, 959 F.2d 820 (9th Cir. 1992). In *Bishop*, the prosecutor claimed to have exercised a peremptory challenge against a black resident of Compton because the neighborhood of her residence would tend to cause her to believe that "police in Compton . . . pick on black people." *Id.* at 822. The court rejected this as a race-neutral characteristic because "the prosecutor's invocation of residence rested on a stereotypical racial reason." *Id.* at 827. The court noted, "Residence, as it were, often acts as an ethnic badge. As study after study has showed, residence, especially in urban centers, can be the most accurate predictor of race." *Id.* at 828. *Compare* United States v. Uwaezhoke, 995 F.2d 388–93 (3d Cir. 1993) (rejecting *Batson* challenge to strike of black single parent residing in a Newark apartment, concluding that such characteristics, while potentially having a disparate impact on black jurors, did not violate *Batson* absent proof of discriminatory intent, but that such impact should invoke "special scrutiny" to determine whether intentional discrimination actually took place).

120 *See* KENNEDY, *supra* note 82, at 154 ("Judges should be more skeptical than many have been of the ability of police officers to use race as an indicia of suspicion without making an unacceptably large number of errors whose consequences fall predictably upon innocent black people.").

121 JEROME E. MCELROY ET AL., COMMUNITY POLICING 7 (1993).

122 *See* John E. Eck & Dennis P. Rosenbaum, *The New Police Order*, *in* THE CHALLENGE OF COMMUNITY POLICING 11 (Dennis P. Rosenbaum ed., 1994). Of course, a wide range of activities, attitudes, and viewpoints fall within the rubric of community policing. Doctors Rosenbaum and Eck argue that community policing can be developed with an eye towards effectiveness, efficiency, and equity, and these three goals might actually develop distinct forms of community policing. *See id.* at 18–19. For an effectiveness-based discussion, see DAVID M. KENNEDY, THE STRATEGIC MANAGEMENT OF POLICE RESOURCES 5–6 (National Institute of Justice: Perspectives

communities to identify and solve community problems[123] requires officers to learn in-depth about issues and concerns in the communities they serve.[124] Understanding norms of law-abiding behavior reflects the importance of these norms to creating and maintaining community order.

4. *The Impact of Innocence*

This approach may tend to protect some innocent persons from police intrusion. "Some" is, of course, the best that can be done. Reasonable suspicion stops are designed to impact a substantial proportion of innocent persons. Assume for the sake of argument that reasonable suspicion requires a 20% likelihood that an individual is presently engaged in criminal activity.[125] If police stop only persons as to whom there is a 20% likelihood of involvement in criminal conduct, they will stop four innocent persons for each wrongdoer if they are doing their jobs right. If the "neighborhood-plus" cases effectively cause the required standard of probability to drop, allowing reasonable suspicion to be found on a smaller quantum of suspicion, that means that a larger proportion of innocent persons may be subjected to stops. If the existing caselaw has caused the standard to drop to 5%, for example, then police may stop nineteen innocent persons for each wrongdoer.[126]

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on Policing, No. 14, Jan. 1993).

[123] *See* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING CHICAGO STYLE 7 (1997).

[124] *See id.* at 8.

[125] As noted *supra*, the courts do not quantify the probability of criminality required to satisfy the reasonable suspicion standard. *See supra* notes 28–29 and accompanying text.

[126] That police suspicion is often erroneous is evident from the significant incidence of cases in which the result of an investigatory stop, while incriminating, is inconsistent with the proffered justification for the stop. *See, e.g.*, United States v. Kerr, 817 F.2d 1384 (9th Cir. 1987) (holding that no reasonable suspicion existed where individual was loading trunk of a car with boxes at a residential property in mid-afternoon in an area where there had arguably been several residential burglaries; defendant was suspected of burglary but search of the building turned up a methamphetamine laboratory); Thompson v. State, 680 So. 2d 1014 (Ala. Crim. App. 1996) (finding reasonable suspicion to stop men standing around a parked car and looking into the trunk in area known for drug trafficking activity; officers suspected drug trafficking but car contained stolen tires); State v. McAfee, 783 P.2d 874 (Idaho Ct. App. 1989) (finding reasonable suspicion where officers observed individual park his van at a curb at 2 a.m. in an area where there had been recent criminal activity; believing he might be engaged in burglary, officers roused him from sleep; his responses suggested intoxication, so he was field-tested for sobriety and ultimately charged with driving under the influence); *see also* PAUL CHEVIGNY, POLICE POWER 204 (1969) ("[T]he police do not unerringly and by some sixth sense pick wrongdoers for their searches. The grounds of their suspicion do not point with any accuracy toward guilt, and their suspicions are often unfounded, just as are those of the rest of us.").

That the police are wrong does not mean their conduct was unlawful. These stops are based

This is an oversimplification, because it assumes that police always act on the minimum permissible suspicion. An officer who routinely stops persons only when he has considerably more than the minimum level of objective suspicion required will, if his assessments are accurate, stop a concomitantly smaller proportion of innocent persons. Almost by definition, however, a case in which the character of the neighborhood is a significant factor in the determination of reasonable suspicion will be a case close to the margin. Prosecutors and police rely on the character of the neighborhood when they have little else; these cases, therefore, are likely to be the most marginal cases of reasonable suspicion.[127] Current doctrine may permit this de facto reduction in the reasonable suspicion standard which will, in turn, have a significant impact on innocent residents of high-crime neighborhoods.

That impact is largely invisible to the legal system. Persons stopped briefly and fruitlessly will not be prosecuted, so the exclusionary rule will not require the courts to confront the circumstances of their stops. They are unlikely to bring civil claims; lawyers have little interest in cases where the intrusion was brief and the damage dignitary; for a plaintiff, the time and effort involved would be substantial and the fear of retaliation significant. Many citizens may prefer simply to walk away. Even if one chooses to bring suit, the likelihood that an innocent person's civil claim of constitutional deprivation arising from an investigatory stop will be successful is comparatively slim.

The structured standard proposed here acknowledges the need to distinguish potential wrongdoers from the rest of the neighborhood. Applying this standard will not eliminate stops of innocent persons, nor should it. But applying this standard significantly constrains the potential to stop any and every person in a high-crime neighborhood, while at the same time leaving considerable room for the courts to apply the flexible standard of reasonable suspicion.

The approach suggested here is designed to enforce, rather than alter, the standard applied to reasonable suspicion stops. Yet, to the extent it limits the consideration of evidence concerning the character of the neighborhood in cases where it is relevant, it may reduce the total number of permissible stops and, with

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on reasonable suspicion, meaning that the law will tolerate a comparatively high percentage of erroneous conclusions. Nonetheless, the frequency with which the asserted justification for the stop in the neighborhood cases is inconsistent with the result may suggest that we should adopt approaches, like that suggested in this Article, which support maintaining meaningful and effective limits on reasonable suspicion stops, minimizing excessive numbers of erroneous intrusions.

[127] Courts freely acknowledge this. *See, e.g.*, United States v. Trullo, 809 F.2d 108, 109 (1st Cir. 1987) (finding reasonable suspicion where officers observed defendant stop his car at the curb in Boston's Combat Zone and converse with a man who then got into his car and drove to a quiet alley; court characterized this as "a close case"); State v. Hebert, 669 So. 2d 499, 503 (La. Ct. App. 1996) (finding reasonable suspicion where police, called to a corner where "suspicious activity" was reported, saw an individual with a bulge in his pocket; court noted the case "turns on a hair" and held the state's case "just barely good").

that, the number of persons stopped who are in fact guilty of a crime. That result is a necessary consequence of protecting residents of high-crime communities from being subjected to stops in the sole discretion of the police.

5. *Advancing Legitimacy: The Judiciary's Role*

Police stops are legitimate only where there is effective judicial oversight of the justifications for those stops. *Terry v. Ohio* itself was premised on the requirement that police actions must be subjected, at some point, to the "detached, neutral scrutiny"[128] of a judicial officer. The requirement of particularized observation makes judicial supervision possible; it requires the officer to proffer an articulable justification that can be meaningfully reviewed.

The "neighborhood plus" cases undermine the judiciary's role as gatekeeper of the legitimacy of police stops. By requiring an articulated, particularized justification for an investigatory stop—but then accepting any proffered justification, no matter how slim, as sufficient—the judiciary preserves its nominal role as arbiter of police conduct without exercising that role in any meaningful way.[129] By contrast, the standard proposed in this Article provides a meaningful

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[128] 392 U.S. 1, 21 (1968):

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id.

[129] Consider the Court's ruling in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Although the Court in *Ornelas* insisted on de novo review of reasonable suspicion determinations, it immediately noted that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers," noting that these facts "yield inferences that deserve deference." This insistence on unfettered judicial review on the one hand, and deference on the other, caused Justice Scalia to note, in dissent, that "[t]he Court cannot have it both ways." *Id.* at 705.

For a comparable example, consider *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), in which the Court rejected Wisconsin's attempt to adopt a blanket exception to the "knock-and-announce" requirement for the execution of search warrants in felony drug investigations. The Supreme Court rejected the idea of a blanket exception, holding that such an approach "impermissibly insulates these cases from judicial review." *Id.* at 1421. Instead, a particularized showing was required; to justify a no-knock entry, the state must show that the investigating officers had a reasonable suspicion that knocking would be dangerous or futile or would inhibit the investigation. *See id.* at 1421–22. Having established the technical dominance of the judiciary as gatekeeper, the Court then deferred, establishing a very low threshold and concluding that the state had met it. It concluded that the circumstances present in *Richards*—the suspect's recognition that there was a

standard for judges to apply, enabling them to fulfill the role set out for them in *Terry*: to "evaluate the reasonableness" of police conduct "in light of the particular circumstances."[130]

IV. CONCLUSION

Police cannot stop a person based solely on the character of the neighborhood where he or she is found. But the neighborhood in which an individual is found shapes both the police response to him or her and the court's ultimate view of the legality of the stop. The courts' treatment of cases in which the character of the neighborhood is a factor in the reasonable suspicion determination is inconsistent and erratic and suggests that current law fails adequately to limit the class of stop-eligible citizens. Although being in a high-crime neighborhood cannot, standing alone, create reasonable suspicion, some courts, under the current standard, effectively allow precisely that.

The character of the neighborhood for criminality should be considered only where the behavior that is relied upon to establish reasonable suspicion is behavior not commonly observed among law-abiding persons at the time and place observed. This standard permits the consideration of the character of the neighborhood, which provides contextual information relevant to the totality of the circumstances inquiry. At the same time, it imposes a meaningful constraint on determinations of reasonable suspicion, requiring that they not be equally applicable to any member of the general public. This approach will enhance the accuracy and logical consistency of reasonable suspicion determinations.

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police officer at the door, plus the "easily disposable nature of the drugs"—sufficed to create the necessary reasonable suspicion. *See id.* at 1422. The court requires a threshold, but sets it low; the individualized justification articulated, however weak, suffices, as long as it is the court that remains the nominal decisionmaker.

[130] *Terry*, 392 U.S. at 21.